PB-230 888

PROJECT ON AIR POLLUTION CONTROL THROUGH COMMON LAW PLEADING

J. William Futrell, et al

Alabama University

Prepared for:

Environmental Protection Agency

1951

DISTRIBUTED BY:

NTIS
National Technical Information Service
U. S. DEPARTMENT OF COMMERCE
5285 Port Royal Road, Springfield Va. 22151

PB 230 888

Contract No. 68-01-0546

UNIVERSITY OF ALABAMA

SCHOOL OF LAW

PROJECT ON AIR POLLUTION CONTROL THROUGH COMMON LAW PLEADING

n.d

Reproduced by
NATIONAL TECHNICAL
INFORMATION SERVICE
U S Department of Commerce
Springfield VA 22151

James T. Johnson
Charles Hollifield
Darryl Hardin
Bryce Callaway
John Kelly
Craig Kneisel
Larry Lester
Bert Taylor
Dorothy Waldrup
Lionel Williams

J. William Futrell
Associate Professor of Law
Project Director

p150

TABLE OF CONTENTS

Page

Introduction i

Chapter I: Commission Procedures -
- Rules of Practice 1-1
- Delegation of authority to the Director 1-4
- Procedures concerning confidential information 1-5
- Procedures in dealing with federal agencies 1-8
- Concerning entry on private property 1-16
- Testimony based on use of Ringlemann Chart 1-20
- Prosecution of fugitive dust cases 1-24

Chapter II: Local Enforcement Programs 2-1
- County Boards of Health 2-1
- Municipalities 2-3
- Enforcement in municipal courts 2-5
- Relationships between local agencies and the Commission 2-8

Chapter III: Pleading and Environmental Law Cases 3-1

Chapter IV: Complaint Forms - 4-1
- Complaint seeking civil penalties 4-2
- Bill of Complaint seeking injunction 4-4

Chapter V: Emergency Action Complaint 5-1
- Bill of Complaint seeking temporary restraining order 5-2

Chapter VI: Index of Violations, Enforcement Procedures, and Forms 6-1
- Violations 6-2
- Enforcement procedures 6-10
- Forms 6-13

Chapter VII: Summary of Recommendations 7-1

APPENDIX

Page

County Board of Health Forms: A-II-1
- Citation A-II-1
- Permits A-II-2
    - Permit conditions A-II-2
    - Temporary permit A-II-3
    - Conditional permit A-II-4
    - Permit to construct A-II-5
    - Permit to operate A-II-6
    - Incinerator permit A-II-7
- Quarterly reports A-II-10

Alabama Pleadings A-III-1
- Complaint seeking recovery of civil penalty A-III-1
- Bill of Complaint combining request for injunctive relief and recovery of civil penalty A-III-6
- Complaint seeking injunctive relief against a federal project A-III-13
- Bill of Complaint seeking to enjoin a nuisance A-III-21
- Bill of Complaint seeking to enjoin a nuisance A-III-36

INTRODUCTION

Alabama is one of the last jurisdictions to retain common law pleading and to maintain separate courts for law and equity; thus any new legal theory presents difficulties not encountered in states with more liberal systems of procedure. The Alabama legal system not only makes the processing of claims more difficult than in other systems but it presents special hazards and barriers in pleading new theories, as is done in environmental litigation which do not fit the ancient forms of action. Accordingly, representatives of the Alabama Air Pollution Control Commission and the Attorney General's office felt it desirable to take a closer look at the legal problems facing the Commission in seeking to enforce the Alabama Air Pollution Control Act of 1971.

During the summer months of 1972 a group of University of Alabama School of Law students have studied the Act and the Rules and Regulations promulgated by the Commission in order to help the Commission develop procedures, forms, and legal citations for enforcement actions of air pollution control programs.

This report is neither a Restatement of Alabama pleading practices nor an explication of the Alabama Act but, rather, a discussion of certain pressing problems selected by personnel in the State Division of Air Pollution Control and listed in the Statement of Work section of the Environmental Protection Agency's contract No. 68-01-0546.

The following pages which are based upon our research and conferences with personnel from the Attorney General's office and the Division of Air Pollution Control discuss those points which we feel are salient toward enforcement of the Alabama Air Pollution Control Act during the initial phase of the Commission's activities.

Chapter 1 discusses Commission procedures. The Commission needs to adopt rules of practice for attorneys or parties. The importance of The Commission regulating itself as to due process matters is more keenly felt because Alabama does not have an administrative procedure act. Guidelines for delegation of work by the Commission, more particularly authorization of citations by Division personnel, are also needed. Other topics discussed in Chapter 1 are the Commission's relationship with polluting federal agencies, the processing of confidential records, evidentiary problems connected with the Ringlemann Chart, and with inspections conducted without proper authorization.

Chapter 2 concerns the role of the Commission as coordinator of the state program. The Alabama Act was intended to utilize the resources of both state and local government. Chapter 2 discusses the procedures which municipalities and county Boards of Health must follow to adopt their own local air pollution programs and also discusses the possibility of supplementing the Division of Air Pollution Control's efforts by a municipal reference ordinance system.

Chapter 3 discusses the theoretical problems of pleading in air pollution enforcement suits in Alabama. Attached as an appendix to Chapter 3 are a number of complaints filed by Alabama attorneys seeking injunctive or legal relief which are illustrative of the problems encountered by the Alabama pleader.

Chapter 4 presents form complaints for initiation of court actions.

Chapter 5 presents a form complaint and supporting affidavits drawn to illustrate enforcement of the Commission's orders in an air pollution emergency situation.

Chapter 6 presents a ready reference index of the various violations and types of enforcement actions which may be initiated under the Act.

Chapter 7 presents a summary of our recommendations to the Commission concerning implementation and enforcement of the Act.

Chapter I

COMMISSION PROCEDURES

The first eight months of 1972 have seen the Alabama Air Pollution Control Commission take significant strides toward accomplishing the goals of the Alabama Air Pollution Control Act of 1971 (Title 22, section 310, Code of Alabama of 1940 as amended; hereinafter, referred to as "the Act"). In January the Commission adopted comprehensive Rules and Regulations and published a state implementation plan which was approved by the Environmental Protection Agency in May. The Commission has implemented each section of the plan, establishing air quality surveillance, source surveillance, and a permit system.

Since the Act's effective date in July, personnel of the Division of Air Pollution Control have been busy. Although no formal enforcement proceedings have been initiated, a number of violator's polluting activities have been curbed through voluntary compliance and the threat of prosecution. Several area wide emergency orders have been issued pursuant to section 11 of the Act. Division personnel have established liaison with the state Attorney General's office and are prepared to initiate legal proceedings to enforce the Act. The following recommendations concerning procedures are designed to aid the Commission in preparing matters for review by the courts.

Rules of Practice Before the Commission

The Alabama Air Pollution Control Commission needs to adopt rules governing procedure before the Commission. Administrative law is an unsettled field in Alabama. The last session of the Legislature failed to adopt a badly needed administrative procedure act despite the strong recommendation of the State Bar

Association. Alabama courts of course review administrative agency cases with the Public Service Commission being the leading source of appeals. The experience of the Public Service Commission may be indicative of the difficulties which the Alabama Air Pollution Control Commission may face.

The Public Service Commission has a more developed system of internal administrative procedure than any other agency in Alabama. The rules of practice used by the Public Service Commission, which contemplate adversary proceeding between private parties, are not appropriate for use by the Alabama Air Pollution Control Commission but they are illustrative of administrative agency rules which have been interpreted by Alabama courts and studied by Alabama lawyers. The work of the Alabama Public Service Commission and the judicial review of its decisions is surveyed in an article by Vastin Stabler,"The Alabama Public Service Commission and the Courts", 22 Ala. Law Review 113. Its rules of practice cover such topics as citation procedures, pleading rules, special rules of evidence, the method of taking testimony, and other matters necessary for insuring procedural due process.

Some of the basic requirements for procedural due process are insured by section (17)(f)(g)(h)(i), of the Act. These four subsections provide for a public hearing at which a written record is to be made with copies available to witnesses and parties, the authority of hearing officers who have subpoena power, and rules of evidence and procedure similar to those used before administrative tribunals in other states. However, the short sketch of the procedure outlined in section 17 is not enough to protect the Commission on appellate review and rules of practice should be drafted.

As Stabler points out at 22 Alabama Law Review, 154-156, the Supreme Court of Alabama has been aggressive in upsetting administrative decisions, relying in part on the doctrine of constitutional facts. In cases involving curtailment of property rights, the court characterizes the economic data and conclusions based thereon as a "constitutional fact," that is, a finding which involves a question of taking of property through allegedly confiscatory rates and uses its independent judgment unhampered by agency expertise. The Supreme Court of the United States actively applied the "constitutional fact" doctrine in the 1920's and 1930's in cases such as Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285 (1932) but has not based a decision on this ground in almost forty years. This reflects in part the jurisprudential shift of the Court in the late 1930's and the increased stature of administrative agencies in the federal system. Such a shift has not occurred in Alabama and state administrative agencies face the prospect of an unsympathetic court on judicial review. The "constitutional facts" doctrine may be of importance to air pollution enforcement in Alabama because the courts could characterize the Commission's orders as confiscatory and then delve into a de novo review of the scientific and technical facts upon which the Commission based its decision.

It should be noted that the Public Service Commission, unlike the Alabama Air Pollution Control Commission, operates under a statute authorizing judicial review which in turn sets guidelines and limits upon the appellate jurisdiction of the court. No such statutory authorization exists for the Alabama Air Pollution Control Commission.

At the very least, the Commission should adopt administrative guidelines concerning the conduct of hearings. Provisions should be made for the hearing examiner to publish findings of facts and conclusions of law justifying his decision. The final order of the hearing examiner should then set the state for a hearing before the full commission. Provision should also be made for opportunity for a rehearing before the Commission and specify how administrative remedies are to be exhausted to set the stage for judicial review.

The specific details of any system of internal procedure which the Commission may adopt are not important; what is important is that the Commission adopt such procedures, that they be published and readily available for the information of parties, and that they be followed.

Commission Delegation of Authority to the Director

The Alabama Act contemplates a comprehensive coordinated state-wide air pollution control effort. Presently, the achievement of this goal is being held back by the Commission's failure to delegate the full range of powers to the Director of the Division of Air Pollution Control which are contemplated by the Alabama Air Pollution Control Act of 1971. Section 17(e) of the Act states,

> "(e) The Commission may, by rule or regulation, authorize the Director to issue citations to any person violating this act, or any rule or regulation of the Commission, commanding said person to cease and desist from violating this act, or any rule or regulation adopted pursuant to this act. This citation shall specify the provision of this act, or rule, or regulation alleged to be violated and shall specify, generally, the facts alleged to constitute a violation thereof. Said citation shall command the person to appear at a hearing in person, or by attorney, at a time and place specified beforethe Commission and show cause why a prosecution for the violation of this act, or of any rule or regulation of the Commission, should not be commenced. No citation shall be issued for an appearance before the Commission on a date less than ten days next after the issuance thereof, except when an emergency air episode has been declared, in which case appearance may be required within twenty-four hours. The citation may be directed to a business or corporation, or to the president, manager, superintendent, or other person in charge of the business or corporation. The citation may be executed by leaving a copy thereof at any office of the business or corporation, or by leaving a copy with some person at said office or at the residence of the president, manager, superintendent, or other person in charge."

Since there are difficulties with a municipal reference ordinance system, enforcement activities by local officials are hampered and the full weight of enforcement activities outside the metropolitan centers of Huntsville, Birmingham and Mobile, the only areas with local programs, fallson the Division's personnel. At the present time the Director and personnel of the Division do not have the authority to issue cease and desist orders as is contemplated by the Act. The Commission should delegate this power so that the Division's personnel under the Director are authorized to issue such citations pursuant to Section 17(e).

Commission Procedures Concerning Confidential Information

The Commission should adopt uniform procedures concerning public inspection of information filed pursuant to section 14 of the Act. Section 14 states,

> "Any records, reports or information obtained under this act shall be available to the public, except upon a showing satisfactory to the Commission by any person that records, reports, or information, or particular part thereof, (other than emission data) to which the Commission has access if made public, would divulge production or sales figures or methods, processes or production unique to such person, or would otherwise tend to affect adversely the competitive position of such person by revealing trade secrets, the Commission shall consider such record, report, or information or particular portion thereof confidential in the administration of this Act."

The procedure envisaged by section 14 is straightforward. An industry should file all relevant data required by the Act whether it be a trade secret or confidential sales information. The complying industry may wish to mark as confidential the data which it wishes to be so treated at the time of submission. Under such a system, the Division of Air Pollution Control would accept the report for filing and the Committee (or the Director, if such duties were delegated to him) would rule on the material's confidentiality or delay the decision to some later date.

The protection extended commercial secrets by section 14 is not unique. Other state and federal statutes such as the Food Drug & Cosmetic Act, 21 USC § 331J and the Freedom of Information Act, 5 USCA § 552 have granted such protection. However, there are few decisions interpreting the operation of these laws in regard to inspection by third parties.

Section 552(b)(4) of the Freedom of Information Act states,

> "(b) This section does not apply to matters that are -
> -- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;--"

In Bristol-Meyers Company v. F.T.C., 424 F.2d 935 (D.C.Cir. 1970) the case was remanded to the trial court for a hearing on which records should be disclosed in response to a motion to produce documents on which the F.T.C. had relied in a rulemaking proceeding based on staff investigation, experience, and available studies and reports. The F.T.C. claimed that many of the reports involved trade secrets or privileged commercial information. The Court's instructions to the trial judge as to the procedure to be followed on remand is illustrative of the process which the Commission will have to undertake in passing on requests for inspection of confidential records by third parties. The Court states at 424 F.2d 935, at 93 ,

> The first exemption cited protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This provision serves the important function of protecting the privacy and the competitive position of the citizen who offers information to assist government policymakers. Nevertheless, the statutory scheme does not permit a bare claim of confidentiality to immunize agency files from scrutiny. The District Court in the first instance has the responsibility of determining the validity and extent of the claim, and insuring that the exemption is strictly construed in light of the legislative intent. The court may well conclude that portions of the requested material are protected, and it may be that identifying details or secret matters can be deleted from a document to render it subject to disclosure. These judgments are possible only after careful consideration of the particular documents in question, and it is for this detailed analysis that we remand.

However, if the Commission were to decide that the information on file should not be disclosed because of the privilege granted by section 14, its decision should be upheld on review in light of the cases affirming the validity of similar sections protecting commercial secrets in the air pollution control statutes of other states. The approach of the New York courts in cases such as *Alberghini v. Tizes*, 328 N.Y.S. 2d 272 (1972); *Werfel v. Fitzgerald*, 23 A.D.2d 306, 260 N.Y.S. 2d 791 (1965); *New York Post Corp v. Moses*, 12 A.D.2d 243, 210 N.Y.S. 2d 88 (1961) is indicative. In *Alberghini*, the petitioner sought to compel the state Health Department to permit him to inspect the Department's records relating to twenty-five migrant labor camps. The Court stated at 328 N.Y.S.2d 273,

> "It has been clearly stated that it is the general policy of the state of New York to make available to public inspection and access all records or other papers kept in a public office, at least where secrecy is not enjoined by statute or rule---. The Public Health Law identifies several categories of public health records which the legislature intends to protect from public inspection. Secret manufacturing formulae or processes discovered during the enforcement of regulations pertaining to air pollution and water pollution control (§§ 1210 and 1277); the identity of patients revealed by records and reports of physicians made pursuant to the requirements dealing with communicable disease control (§§ 2221 and 2306); the identity of persons reported to be suffering birth defects (§ 2733); the identity of users of certain drugs discovered during the enforcement of regulations pertaining to the Narcotic Drug Control Law (§§ 3304 and 3389), are all required to be kept confidential.
>
> Justification for the legislative treatment of these special categories is apparent. The protection of the legitimate interest of the owner of a valuable secret formula or process overrides the interest of the public to have access to knowledge of such formula or process."

The Court refused to expand the privilege, holding that those privileges granted by the legislature would be strictly enforced, but also strictly limited. In Werfel, a New York attorney sought inspection of juvenile court records in order to locate a witness needed in preparation of his client's trial. The Court refused to allow inspection, strictly construing the statute making such records confidential.

The Alabama act vests determination of whether information is confidential in the Commission. But the Commission should adopt procedures as to the time and manner of passing on the question whether information is to be treated as privileged. A uniform policy is needed in order to avoid the appearance of arbitrariness if and when its decisions are challenged in the courts.

Commission Procedures in Dealing with Polluting Federal Agencies

One of the Air Pollution Control Commissions strongest allies in dealing with air pollution in Alabama is the Environmental Protection Agency, a branch of the Federal Government. Ironically, the state's most severe air pollution problems are caused by installations operated by other federal agencies. The plant at Widow's Creek in Jackson County operated by the Tennessee Valley Authority is the largest steam plant in the United States. During the period covered by a 1969 survey it dumped 231,000 tons of particulates and 249,204 tons of sulphur oxides into the air. Another plant operated by TVA in Colbert County discharged 156,423 tons of sulphur oxides and 95,000 tons of particulates into the atmosphere during the same period. The Army Missile Command's Redstone Arsenal's steam generation plant is responsible for almost 100% of the sulphur dioxide and 20% of the particulate matter discharged in the Huntsville, Alabama area. To do its job the Commission must exercise its authority over these polluting federal installations.

Authorities at these installations when approached by representatives of the Alabama Air Pollution Control Commission have responded in much the same way as authorities at federal installations in other states by expressing a willingness to cooperate but refusing to recognize the Commission's authority to regulate their polluting activities. Indeed, they have continued the massive emissions despite requests for abatement. The authorities in charge of the various federal agencies want to keep their freedom of action in developing pollution control equipment and cooperate with state pollution authorities on a voluntary basis. In dealing with polluting federal agencies the Commission should insist on its authority to compel compliance with the Alabama Act. If necessary, the Commission should be prepared to go to court to force abatement of the discharges.

Authorities in other states have had to do so in order to implement their air pollution control programs. Experience in these other jurisdictions has revealed that the federal government's first line of defense is a plea of sovereign immunity. The first approach is that of direct regulation with suit being brought against the federal agency itself. This has the advantage of confronting the real issues immediately but runs afoul of the defense of sovereign immunity. The second approach which is to file suit against the individual in charge of the agency alleging that he has superseded his authority has been used successfully by state environmental commissions and private conversation groups.

Procedurally, the direct approach of filing suit against the agency would be preferable because the real issues would be reached quickly. However, for a state to effectively subject a federal agency to its regulation of air pollution, it must be possible for the state to bring suit against that agency. For this to be possible, there must be a waiver ot sovereign immunity, an expression of consent to be sued, which must be given by Congress. Stanton v. United States, 434 F.2d 1273 (5th Cir. 1970); United States v. Transocean Air Lines, Inc., 386 F.2d 79 (5th Cir. 1967), cert. denied, 389 U.S. 1047 (1968); New Orleans Stevedoring Co. v. United States, 439 F.2d 89 (5th Cir. 1971).

Although it would appear from the framework of the Clean Air Act, 42 U.S.C. 1857 et seq., that Congress intended to waive immunity, the language does not explicitly authorize suit.

Section 101(a)(3) of the Clean Air Act states that "the Congress finds that the prevention and control of air pollution at its source is the primary responsibility of States and local governments". "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State". Section 107(a). Section 116 states that "except as otherwise provided in sections 209, 211 (c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emission of air pollutants or (2) any requirement respecting control or abatement of air pollution."

From the above, it would seem that Congress intended that each State have complete regulatory and enforcement responsibility for the area within that State, and over all stationary sources of air pollution found therein. This conclusion is reinforced by two other sections of the Act: 113 and 118.

Section 113 provides for federal enforcement of the State Act only when there is a blatant dereliction of duty on the part of the state to enforce the Act itself. At all other times the state seems to have complete enforcement responsibility. Section 118 states that "each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements". It is clear, therefore, that Congress intended to subject all Federal departments, agencies, and instrumentalities to local regulation in the effort to achieve compliance with national ambient air quality standards promulgated under sections 109-112 of the Clean Air Act.

But to merely subject Federal agencies to State Regulations is not enough. Unless the state has the power to enforce those regulations the Clean Air Act amounts to a mere request for compliance. Surely this is not what was intended by section 118 of the Clean Air Act. Under section 113, the Federal Government is not empowered to act unless the state first has the opportunity to do so. The state has primary responsibility. Unless it has the power to compel compliance, the Act is seriously weakened as to Federal agencies.

It would seem that Congress intended to waive sovereign immunity and allow the states to sue under the Clean Air Act. The question is whether or not the language in the Clean Air Act is sufficiently expressive of Congress' intent to waive sovereign immunity, because, unfortunately, precise words to that effect were not utilized in the Act. "The United States may be sued only when it has expressly consented to be sued, and such consent may not be implied from convenience and necessity or from considerations of reasonableness and justice." Wells v. U.S., 214 F.2d 380 (5th Cir. 1954), cert. denied 348 U.S. 855 (1954). "Probably no principle of law is better established than that the United States may not be sued without its consent. . . . Absent a waiver of sovereign immunity by specific congressional consent, the federal district courts have no jurisdiction over claims against the United States. . . . Moreover, acts of Congress waiving sovereign immunity must be strictly construed. Exceptions to sovereign immunity are not to be implied". Stanton v. United States, 434 F.2d 1273 (5th Cir. 1970). See also Barefield v. Byrd, 320 F.2d 455 (5th Cir. 1963), cert. denied 376 U.S. 928 (1964). Danning v. United States, 259 F.2d 305 (5th Cir. 1958).

Language effectively waiving sovereign immunity and authorizing suit against the sovereign is found in the Federal Torts Claim Act, 28 U.S.C. 1346(b) which states,

> "(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

This is to be compared with section 118 of the Clean Air Act which states that a federal agency "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements". Under both acts local law is involved, and the United States is subjected to that law as if it were a private person. The Federal Tort Claims Act speaks in terms of liability. The Clean Air Act does not use such strong and explicit language, speaking instead in terms of duty.

The usual tactic by private conservation groups and state attorney generals in environmental litigation involving the federal government as defendant is to avoid the sovereign immunity tangle by suing the agency head or official in charge of the program as an individual. When groups such as the Sierra Club, the Environmental Defense Fund, and the Natural Resources Defense Council sue the government they usually do this, alleging that the defendant exceeded his authority. See Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728 (W.D. Ark. 1971); Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971). However, suits against an agency head runs into the same problems of immunity that suits against the agency encounter unless it can be shown that the agency head acted ultra vires his authority. In that case, he cannot claim immunity, and is subject to State law covering his actions. "Sovereign immunity does not prevent a suit against a federal officer who is acting in excess of his authority. . . . Since the decision in U.S. v. Lee, 106 U.S. 196, . . . the traditional remedy of a person aggrieved by governmental action, and precluded from a suit against the sovereign by the doctrine of immunity, has been a suit against the government officer for that action, and such suits have been permitted when the officers have exceeded their statutory powers". Pan American Petroleum Corporation v. Pierson, 284 F.2d 649 (10th Cir. 1960). Thus it must be alleged that the federal officer acted ultra vires his authority, since suits against an officer in name only, which are in reality against the agency will, theoretically, not be permitted. "The general rule is that a suit is against the sovereign if the judgment sought would depend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or compel it to act". Dugan v. Rank, 372 U.S. 609, 83 S. Ct. 999 (1963).

In a suit against a federal official in charge of an installation violating the state's air pollution laws, the limits ot the said officials authority will be traced by the duties imposed by the Clean Air Act and executive orders issued thereunder. Section 118 of the Clean Air Act requires that, "each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements". President Nixon, pursuant to authority given him by the Clean Air Act, has ordered that the "Federal Government in the design, operation, and maintenance of its facilities shall provide leadership in the nationwide effort to protect and enhance the quality of our air and water resources". Executive Order 11507, Section 1, February 4, 1970. It was further ordered in Section 4(a)(1) that "heads of agencies shall ensure that all facilities under their jurisdiction are designed, operated, and maintained so as to meet the following requirements: Facilities shall conform to air . . . quality standards as defined in section 2(d) of this order". Section 2(d) defines air quality standards as the "quality standards and related plans of implementation . . . adopted pursuant to the Clean Air Act. . . ." Section 110 of the Clean Air Act provides for the adoption by each state of an implementation plan to be used in achieving compliance with national ambient air quality standards. Thus, agency heads are under a duty to comply with state implementation plans. Thus, if an agency head did not order compliance with State regulations, or for any reason did not comply, he would be acting ultra vires his authority and therefore subject himself to suit under State law.

If a judgment against an officer individually would act in fact against the sovereign, it is considered a judgement against the sovereign. It is obvious that any successful action against an agency head to force compliance with State air quality standards will ultimately require an expenditure of time, energy and money by the agency, that is, the sovereign. But the Supreme Court has held that if an officer acts ultra vires his authority he waives the defense of sovereign immunity. This conflict is resolved by _Dugan_, supra, and _Malone v. Bowdoin_, 369 U.S. 643, 82 S. Ct. 980 (1962) where it is indicated that suit _will_ be allowed against an officer whenever he acts ultra vires his authority.

It seems clear that Congress and the President have commanded all federal agencies to comply with local and State regulations. If an agency head failed to order compliance, or if for any reason an agency failed to meet the standards, he would have acted ultra vires his authority, and subjected himself to suit under state law.

These principles were applied in California v. Davidson, 3 E.R.C. 1157 (N.D. Cal. 1971) in which the Court required the Commanding General of Fort Ord to file an answer in a suit seeking compliance with the State of California's water quality standards. The decision whether to dismiss or not turned on whether the General had acted pursuant to the authority conferred by federal law. The State successfully argued that the defendant had violated the limitations on his authority stemming from the Federal Water Pollution Control Act, 33 U.S.C. 466(i) and executive orders issued pursuant to the Act directing federal agencies to comply with federal water quality standards. The Court construed the Act to require compliance with both state and local water quality standards and denied the General's motion to dismiss based on the defense of sovereign immunity.

Thus, the Alabama Air Pollution Control Commission, in a suit against TVA or a similarly situated federal agency refusing to comply with its orders, should name the agency official in charge of the operation as a defendant. A complaint illustrating such a tactic is the complaint in "State of Alabama v. Corps of Engineers et al" which is reproduced in the appendix to chapter III. The Commission does not have to content itself with delays and repeated promises of voluntary compliance by the federal agency when resort to the courts is available.

Commission Procedures Concerning Entry on Private Property:

The Commission should adopt internal procedures governing entry by its investigators on private property. Such procedures are needed to avoid exclusion of evidence on the ground that the fruit of an illegal search. Section 9 of the Alabama Act states,

> (a) Any duly authorized officer, employee or representative of the Department may enter and inspect any property, premises or place at which an air contaminant source is located or is being constructed, installed or established at any reasonable time for the purpose of ascertaining the state of compliance with the Act and rulles and regulations in force pursuant thereto. No person shall refuse entry or access to any authorized representative of the Department who requests entry for the purpose of inspection and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with any such inspection. If requested, the owner or operator of the premises shall receive a report setting forth all facts found which relate to compliance status.

Despite the broad language of Section 9 it is doubtful whether any information or evidence obtained by an employee or representative of the Division of Air Pollution Control from an entry upon private property made over the objection of the owner would be admissible to procure a conviction or fine of the occupant or owner.

The legal difficulty with such an inspection is based on the Constitution's Fourth Amendment prohibition of unreasonable searches and seizures. After many years of controversy, the Supreme Court of the United States has explicitly declared that warrantless searches of private property carried out in public health inspection are invalid. This applies to both residential and commercial property. In Camara v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727 (1967) the Court held that administrative searches by municipal health and safety inspectors without a search warrant constituted a significant intrusion upon interests protected by the Fourth Amendment. The Court held that an inspector for the city of San Francisco must get a warrant and show probable cause for its issuance before he could enter an apartment over the protests of the tenant.

In See v. City of Seattle, 387 U.S. 541, 87 S. Ct. 1737 (1967), the companion case to Camara, it was held that a search warrant was required for the inspection of commercial property being inspected as part of a routine, periodic canvass to check compliance with Seattle's fire code. The Supreme Court stated,"

> "As we explained in Camara, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by warrant. -- We therefore conclude that administrative entry, without consent, upon the protions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure."

Both the Camara and See cases speak to the situation where entry is forbidden by the occupant or owner. It has been the experience of most municipal agencies since these decisions were handed down that permission is readily granted in the vast majority of cases in which the administrative inspector seeks to enter the premises. The problem arises only when the occupant seeks to bar the inspector's entry. In such a case, the doctrines of See and Camara militate against the unthinking application of Section 9 of the Alabama Act.

A number of states have responded to See and Camara by enacting special statutes dealing with administrative search and inspection warrants. Such a statute is section 15-27.2 of the General Statutes of North Carolina dealing with administrative search and inspection warrants which states:

> Warrants to conduct inspection authorized by law.--
>
> (a) Notwithstanding the provisions of article 4 of this chapter, any official or employee of the State or of a unit of county or local government of North Carolina may, under the conditions specified in this section, obtain a warrant authorizing him to conduct a search or inspection of property if such a search or inspection is one that is elsewhere authorized by law, either with or without the consent of the person whose privacy would be thereby invaded, and is one for which such a warrant is consitutionally required.

(b) The warrant may be issued by any magistrate of the general court of justice, judge, clerk, or assistant or deputy clerk of any court of record whose territorial jurisdiction encompasses the property to be inspected.

(c) The issuing officer shall issue the warrant when he is satisfied the following conditions are met:

(1) The one seeking the warrant must establish under oath or affirmation that the property to be searched or inspected is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property, or that there is probable cause for believing that there is a condition, object, activity or circumstance which legally justifies such a search or inspection of that property;

(2) An affidavit indicating the basis for the establishment of one of the grounds described in (1) above must be signed under oath or affirmation by the affiant;

(3) The issuing official must examine the affiant under oath or affirmation to verify the accuracy of the matters indicated by the statement in the affidavit;

(d) The warrant shall be validly issued only if it meets the following requirements:

(1) It must be signed by the issuing official and must bear the date hour of its issuance above his signature with a notation that the warrant is valid for only 24 hours following its issuance;

(2) It must describe, either directly or by reference to the affidavit, the property where the search or inspection is to occur and be accurate enough in description so that the executor of the warrant and the owner of the possessor of the property can reasonably determine from it what person or property the warrant authorizes an inspection of;

(3) It must indicate the conditions, objects, activities or circumstances which the inspection is intended to check or reveal;

(4) It must be attached to the affidavit required to be made in order to obtain the warrant.

(e) Any warrant issued under this section for a search or inspection shall be valid for only 24 hours after its issuance, must be personally served upon the owner or possessor of the property between the hours of 8:00 A.M. and 8:00 P.M. and must be returned within 48 hours.

(f) No facts discovered or evidence obtained in a search of inspection conducted under suthority of a warrant issued under this section shall be competent as evidence in any civil, criminal or administrative action, nor considered in imposing any civil, criminal, or administrative sanction against any person, nor as a basis for further seeking to obtain any warrant, if the warrant is invalid or if what is discovered or obtained is not a condition, object, activity or circumstance which it was the legal purpose of the search or inspection to discover; but this shall not prevent any such facts or evidence to be so used when the warrant issued is not constitutionally required in those circumstances.

(g) The warrants authorized under this section shall not be regarded as search warrants for the purposes of application of article 4 of chapter 15 of the General Statutes of North Carolina. (1967, c. 1260)

It is the recommendation of this project that the Alabama legislature enact a similar statute to govern administrative search and inspection warrants.

Without such authority legislative and without an administrative inspection warrant, the evidence obtained by any representative of the Division entering on property, over the objection of the occupant or owner, may be held inadmissible at the hearing and on trial of the case.

Testimony Based on Use of the Ringlemann Chart

For successful enforcement proceedings attorneys and Commission personnel should make a realistic appraisal of sources of proof. Air pollution suits may often turn on expert testimony and interpretation of technical data. One readily used technical standard sure to figure in future Commission litigation is the Ringlemann Chart and attorneys representing the Commission should be prepared to defend its use.

Section 4.1.1(a) of the Alabama Air Pollution Control Rules and Regulations states,

> "No person shall discharge into the atmosphere from any single source of emission whatsoever any air contaminant of a shade or density darker than that designated as No. 1 on the Ringlemann Chart of 20 per cent opacity."

Other regulations in chapter 4 of the Rules also define violations in terms of Ringlemann Chart measurements. The Commission's attorneys should be prepared to defend in court the competency of testimony based on Ringleman Chart measurements.

A fair consideration of testimony based on the Ringlemann Smoke Chart as evidence in air pollution litigation must reflect both its acceptance by the courts and continuing criticism by the scientific community. Although the Chart's validity has been questioned by scientists and engineers as an accurate measure of smoke density, only slight reservations have been expressed as to its use by the Courts. Introduced into the United States in the 1890's the chart was made the universal standard for control of smoke emissions by state and local governments. The Ringlemann Chart was first published by the Technological Branch of the Geological Survey in 1908, Bureau of Mines, Information Circular IC 8333, p. 2, and implicit judicial approval of its use was given as early as 1916. Northwestern Laundry v. Des Moines, 239 U.S. 486, 36 S. Ct. 206 (1916).

Northwestern Laundry sought to enjoin the enforcement of the Des Moines smoke abatement ordinance arguing that it was arbitrary in its standard for measuring degress of density of smoke. While the ordinance did not explicitly the Ringleman test, it was evident that it was used and the Supreme Court upheld the procedure.

The Northwestern Laundry case raises as many questions as it answers for what was not an arbitrary test in 1916 may well be an arbitrary test today. A regulation or statute valid when enacted may become invalid later because of changed conditions. Evidence as to changed conditions in the kinds of pollutants and methods of accurately measuring the quantity of emissions should be considered along with advances in technology for what was not an alternative sixty years ago may be a valid alternative today.

In People v. International Steel, 226 P2d 587 (Cal. Superior Court, 1951), it was contended that test based on use of the Ringlemann Chart was discriminatory since one who continuously discharges smoke of an opacity just under the prescribed shade emits more total pollutants than one who exceeds the proscribed opacity for a brief period, but operates well below it the rest of the time. The court held that drawing the line between permission and prohibition is a matter of legislative discretion and that the section of the Health and Safety Code authorizing use of the Ringlemann Chart set forth an ascertainable standard which was neither vague or uncertain.

The International Steel Co., case was followed in Arizona v. Arizona Mine Supply Co., 107 Ariz. 199, 484 P2d 619 (S. Ct. 1971) in which the court held that the Ringlemann Chart extablished an ascertainable standard of guilt and was not void for vagueness. The Supreme Court passed on Arizona regulations which are similar to those set out in chapter 4 of the Alabama Rules and Regulations.

In Sittner v. City of Seattle, 384 P2d 859 (S. Ct. Wash. 1963), petitioners, 25 salvage businesses which burned metal in preparation for foundry use, sought a declaratory judgment declaring a Seattle ordinance based on use of the Ringlemann Chart unconstitutional. Petitioners contended that the test had no relationship to prevention of air pollution because it did not measure either the toxic contents or opacity of the smoke, but rather its coloration. The court stated at page 860,

> "Although the 'opacity' standard may not detect all of the air contaminants which pollute the air, we cannot say that it is not a reasonable means by which to detect some of the contaminating particles which smoke contains. It is no defense that the 'opacity' standard does not regulate all air contamination but permits some emissions to go unpunished since a law designed to prevent one evil is not void because it does not prevent another. Similarly, while it is true that the Ringlemann Smoke Chart measures coloration and not opacity, it does not necessarily follow that the chart may not be reasonably used as a basis for determining opacity."

Use of the Ringlemann Chart as a standard was qualified in Western Alfalfa v. Air Pollution Variance Board, 3 E.R.C. 1399 (Col. District Court, 1971), in which the court held that the test must yield to a more precise test of pollutant emissions. The defendant sought a variance to continue his operations on the ground that the emissions for which he was cited were largely mixed with steam, a non-pollutant. The court determined that testimony based on the Ringlemann Chart was not the only factor to be considered, stating,

> "While the Ringlemann Chart test is a good and sufficient basis to institute proceedings or a hearing before the Air Pollution Variance Board, it is evident by the testimony, both before the Board and this Court, that it is not the only test relating to matters set forth in the Air Pollution Control Act concerning violations thereof and that careful consideration should be undertaken by the Board if there is presented to them evidence resulting from a more precise test of the pollutant emissions. Western Alfalfa v. Air Pollution Variance Board, supra, at 1401.

In 1937 Lionel S. Marks of Harvard University in "Inadequacy of the Ringlemann Chart," 59 Mechanical Engineering 681, concluded that the Ringlemann Chart did not give reliable information about smoke density and proposed that it should not be used as evidence in legal proceedings.

He explained that the opacity of smoke depends upon the amount of light passing through it and that this in turn was affected by the lightness of the sky, time, density of the smoke, the thickness of the smoke screen, wind, the pressure of steam, etc. Unless these variables were accounted for, the relationship between the actual density of a column of smoke and its visual density could not be accounted for.

Marks established that the thickness of the smoke column has an effect upon its visual density by using a photoelectronic cell to measure the amount of light passing through two columns of smoke of the same actual density and composition, but of different thicknesses. The amount of light passing through the "thick" column of smoke was less than that of the "thin" column. When smoke of the same actual density was viewed on both a dark background and a light background, it appeared much denser against the dark background. Marks concluded that a visual determination of smoke density had no significance in terms of actual smoke density unless the condition of the background was determined and allowance was made for departures from a standard brightness of the background and other variables.

While use of the Ringlemann test has been accepted by courts in the past, it predictably will continue to be subject to attack in view of the criticism is has received from engineers and management. Marks' criticism of 25 years ago has not effected judicial reliance on the test and Commission lawyers facing a challenge to testimony based on the Ringlemann Chart should be prepared to defend its use. The weight of opinion cited in the cases above favors judicial acceptance of testimony based on its use.

Prosecution of Fugitive Dust Cases

The Alabama Air Pollution Control Commission's Rules and Regulations have codified common law tort doctrines relating to dust nuisances. One is required to take "reasonable precaution to prevent particulate matter from becoming airborne." Rules 4.2.1. The Director is authorized to require that any building emitting dust "in such a manner and amount as to cause a nuisance" to be tightly closed against such emissions. Rules 4.2.3 Another provision prohibits "the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate." Rules 4.2.2. Although this language is not found in the nuisance cases, it is in fact the problem with which the nuisance cases deal.

The term "visible emissions" which is not defined either in the Rules or in Alabama nuisance cases is subject to two possible interpretations; emissions visible in the atmosphere or visible deposits from emissions. Alabama nuisance cases involving fugitive dust suggest that the common law test was visible deposits. In McClung v. Louisville and N. R. Co., 255 Ala. 302, 51 So.2d 371 (S. Ct. 1951), the defendant's railroad cars were loaded by hand from trucks parked in such a manner that dust and other particulates were caught by the wind and blown into homes in a nearby high income residential neighborhood. The court in McClung stated that coal dust constitutes a nuisance in fact where it annoys and disturbs the inhabitants of a residential section of a city. The test for nuisance applied by the court was whether the inconvenience was such as would affect an ordinarily reasonable man. McClung, at 306. This test was also applied in Alabama Power Co. v. Stringfellow, 228 Ala. 422, 153 So. 629 (S. Ct. 1934) and First Ave. Coal & Lumber Co. v. Johnson, 171 Ala. 470, 54 So. 598 (S. Ct. 1911).

The Rules' requirement to use reasonable precautions to abate fugitive dust is similar to the process of balancing equities in nuisance law. In Beam v.

Birmingham Slag Co., 243 Ala. 313, 10 So.2d 162 (S. Ct. 1942) the defendant operated a slag crusher which the plaintiff alleged caused dust to fall upon his property in such quantity as to be a nuisance. The case turned on the trial court's misapplication of the statute of limitations, but in reversing the Supreme Court upheld the plaintiff's right to use his property free from unreasonable burdens, balancing the plaintiff's interest against the defendant's commercial interest.

The air pollution law does not abrogate the common law remedy of public nuisance. Section 15(a) of the Act explicitly states, "However, nothing herein shall be construed to limit or abrogate any private remedies now available to any person for the alleviation, abatement, control, correction, or prevention of air pollution or restitution for damage resulting therefrom." Even without this explicit language, the private remedy should be held to be preserved. In *Ohio River Sand v. Kentucky* 2 ERC 1577, 467 S.W. 2d 347 (Ky. Ct. App. 1971), the defendant-polluter, indicted for maintaining a public nuisance by discharging dust into the air and streams, contended that an air pollution abatement law abrogated the common law nuisance remedy where the same facts also made the company liable to prosecution for a criminal statute. The court held that the intention to abrogate the common law nuisance remedy would not be presumed unless the intent to do so was clearly apparent in the statute.

CHAPTER II

LOCAL ENFORCEMENT PROGRAMS

The Alabama Air Pollution Control Act of 1971, Title 22, Section 310, Code of Alabama of 1940, as amended envisions a system of enforcement which relies on a coordinated local and state effort. The Commission is the coordinating agency and has the power and authority to ensure that local programs keep the same standards required by the State. The chief local body for air pollution control will be the county board of health. Personnel in the Division of Air Pollution Control would like to see municipalities play a larger role in the enforcement scheme by using municipal courts to prosecute violations of municipal reference ordinances on air pollution. This probably cannot be done without amending the Act because of preemptive language in Section 15 which is discussed below. We recommend that this section be amended to allow a reference ordinance system.

Establishment of Local Air Pollution Control Programs by County Boards of Health

Section 15(b) of the Act states,

> "(b) Subject to the provisions of this Section --- each county Board of Health shall have the authority to establish, and thereafter administer, within its jurisdiction a local air pollution control program. . . ."

The remainder of Section 15(b) and subsections 15(c) and 15(d) outline the qualifications and guidelines for the County Board of Health program.

Each Board seeking to establish a local program is required to set standards for the control or prevention of air pollution which are consistent with the Act or rules promulgated by the Commission. Section 15(b)(1). The Board may adopt regulations for air pollution control and enforce them without further approval by the Commission when the regulations are identical to those adopted by the Commission or where the contaminant sources of pollution are not covered by the act. Section 15(d) (1), (2). While a local program may establish requirements which are more restrictive, the Commission must approve them prior to their implementation. Section 15(d)(3) The Board's program must provide for enforcement of its requirements by appropriate administrative or judicial process and must be adequately funded and staffed by the county. Section 15(b)(2)(3)

A county seeking to establish a local air pollution control program is required to have a public hearing. Notice must be given to the public through advertisements at least 20 days prior of the date, time, place and purpose of the hearing. Section 15(b)(2). An example of such an announcement entitled "Jefferson County Board of Health Air Pollution Control Rulemaking" is included in the appendix. The hearing must be held before a hearing officer and all testimony stenographically recorded. This record which can be supplemented by written submissions must be available for public inspection. Section 15(b)(2), Section 13.

Each Board has the duty of notifying the Commission of the adoption of requirements under the local program and of providing the Commission with a certified copy of its regulations within 15 days of adoption. Section 15(d)(4). The Board is to submit an annual report to the Commission concerning the operation of the local program which is to contain, but is not limited to, information regarding regulations adopted or under consideration, administrative procedures and organization, staff and finances, enforcement activities, emission inventories, air quality monitoring systems, and a report on the program's progress and problems related to administration, along with any other information which the Commission might reasonably require. Section 15(i).

If the Commission has reason to believe that the Board's program is inadequate or does not conform with the requirements of the Act, it may, after due notice hold a hearing concerning the local program. If it finds that the program is deficient, the Commission may, under its preemptive powers terminate the program. (Section 15e).

Presently, local programs operated by county Boards of Health are in effect in the state's two most populous counties, Mobile and Jefferson. The Jefferson County Board of Health deals with the chronic air pollution problems of Birmingham and has adopted regulations, forms, and citations which will serve as a useful model for other Alabama counties seeking to set up a local program. A sample citation and forms used by the local programs are attached as an appendix. Those familiar with the state's forms will note that the County has simply borrowed the state forms and affixed its official seal as imprimatur.

Also attached as an appendix to this chapter is a quarterly report from Jefferson County Air Pollution Program to the Commission which is illustrative of the type reporting required of the local program under the Act.

Establishment of Local Air Pollution Programs by Municipalities

Section 15(b) of the Alabama Air Pollution Control Act of 1971, Title 22, Section 310(15)(b) states,

> "Subject to the provisions of this section, each municipal governing body, which had municipal ordinances in effect on or before July 1, 1969, which pertain to air pollution control and which provide for the creation and establishment of an air pollution control board, --- shall have the authority to establish, and thereafter administer, within its jurisdiction a local air pollution control program which: ---"

The grandfather clause of section 15(b) authorizing local air pollution control programs only for those municipalities which had ordinances in effect on or before July 1, 1969 operates to bar all municipalities except Huntsville, Alabama from establishing a local program. Therefore, the provision for municipal programs in the Act is meaningless to the other cities of Alabama.

During the course of our project, students had the opportunity to confer with representatives of the Municipal Air Pollution Control Program in Huntsville and to compare the Huntsville Rules and Regulations with the State Commission's Rules and Regulations. The two codes are almost identical.

The Huntsville requirements are as stringent as the requirements promulgated by the Commission. In fact, they are more restrictive in three areas; odor control, open burning which is allowed only with written permits, and incinerator control. The Huntsville air pollution control officer actually passes on specified designs for incinerators and hours of burning. The program is financed through the municipality and provides for administrative and judicial process.

The requirements for municipal programs set forth by section [illegible] of the Act are similar to those outlined for local programs administered by county boards of health discussed in the previous memorandum. Any municipality qualifying under the Act must follow the same process of noticing and holding a public hearing, making a transcript of the proceedings, clearing its activities with the Commission, etc.

The section governing municipalities is of little importance now since Huntsville was the only city to have a program before the Act's cutoff date. Therefore, the main vehicle for local enforcement of air pollution activities in Alabama will be the county boards of health.

Enforcement of Violations of Air Pollution Laws in Municipal Courts

Many Alabama observers of state government believe it would be advisable to use municipal authorities and courts to help enforce the Act. By giving citations for the many small offenses which can be curbed by prompt action, local authorities could make a significant contribution in supplementing state efforts to achieve widespread enforcement of air pollution control laws.

A device widely used in other areas of the law to accomplish this goal of comprehensive enforcement by state and local authorities is the municipal reference ordinance. A reference ordinance simply adopts a state misdemeanor statute and declares a violation of the state statute to be a municipal offense and does not require establishing a local program.

Section 17(d) of the Act states,

> "(d) Any person who knowingly violates or fails or refuses to obey or comply with this Act or any rule or regulation adopted thereunder or knowingly submits any false information under this Act or any rule or regulation thereunder shall be guilty of a misdemeanor and upon conviction may be sentenced to hard labor for the county for not more than one year."

It would appear that through the device of the municipal reference ordinance any Alabama city could adopt the provisions of the Alabama Air Pollution Control Act of 1971 and enforce its provisions against violators. The Alabama Supreme Court has consistently upheld the use of the municipal reference ordinance device in cases such as Slayton v. State, 31 Ala. 622, 21 So. 2d 122 (1945) and State v. Town of Springville, 220 Ala. 286, 125 So. 387 (1929).

Section 89 of the Alabama Constitution of 1901 states the constitutional ground for application of the preemption doctrine.

> "Sec. 89. The legislature shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of this state."

The companion statute to this constitutional mandate is found in Title 37, Section 455 entitled "Power to adopt and enforce ordinances."

> "Sec. 455. Power to adopt and enforce ordinances. Municipal corporations may, from time to time adopt ordinances and resolutions not inconsistent with the laws of the state, to carry into effect or discharge the powers and duties conferred by this title, and provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of the inhabitants of the municipality and enforce obedience to such ordinances by fine not exceeding $100 and by imprisonment or hard labor not exceeding six months, one or both."

Decisions under Section 455 have established liberal precedents for the upholding of reference ordinances. Only ordinances which supercede or are incompatible with the state statute have been held invalid and ordinances which provide for additional regulation and in some cases enlarge upon the provisions of the statute by requiring more restrictions than the statute itself have been consistently approved.

However, municipal reference ordinances on air pollution may not be possible because of the specific language of Section 15 of the Act which states,

> "Sec. 15 Local Programs
>
> (a) Except as provided herein, it is the intention of this Act to occupy by preemption the field of air pollution control within all areas of the State of Alabama. However, nothing herein shall be construed to limit or abrogate any private remedies now available to any person for the alleviation, abatement, control, correction, or prevention of air pollution or restitution for damage resulting therefrom."

Thus, any municipal reference ordinance on air pollution would seem to run afoul of Sec. 15(a) which explicitly states that the Act preempts the field other than local programs specifically authorized in sections 15(b) and sec. 15(c).

The second sentence of Section 15(a) excepting private remedies clearly does not refer to municipal ordinances which are quasi-criminal in nature.

See State v. Town of Springville, supra. Just by their designation as municipal ordinances, such laws are excluded from the purview of private remedies.

The explicit and detailed separate treatment of local municipalities in section 15(b) reinforces a preemptive interpretation of section 15(a). Section 15(b) is that part of the statute which enables qualifying municipalities to establish local programs and states in pertinent part,

> "15(b) Subject to the provisions of this Section, each municipal governing body, which had municipal ordinances in effect on or before July 1, 1969, which pertain to air pollution control and which provide for the creation and establishment of an air pollution control board, and each county Board of Health shall have the authority to establish, and thereafter administer, within its jurisdiction a local air pollution control program, which:"

The remaining paragraphs of Section 15(b) set out the procedure to be followed in establishing a municipal program. Huntsville was the only city in Alabama which had a program in effect on or before July 1, 1969 in order to qualify under thie section. Provision could have been made for reference ordinances for those municipalities which did not qualify if the legislature had so desired.

Were not the language of Section 15(a) so explicit in stating that the Act preempts the field, arguments could be made that properly drafted reference ordinances would be upheld by Alabama courts.

However, when the municipal ordinance has been found to be inconsistent with the state statute, the Supreme Court of Alabama has not hesitated to strike it down. In City of Mobile v. Garrett-Montgomery, Inc., 281 Ala. 204, 201 So. 2d 42 (1967) the Supreme Court, citing Section 89 of the Constitution, struck down an ordinance which established a municipal board to pass on qualifications of applicants for plumber's certificate holding that it was in conflict with a statute governing certification of plumbers in counties with a population exceeding 150,000.

The Commission should consider whether it desires to make the local county health boards (in addition to the special case of Huntsville, Alabama, with its municipal ordinance enforcement system) the only organ of local enforcement. If supplementary aid from municipal governments is desired, then Section 15 of the Act should be amended to authorize reference ordinances.

The Relationship Between Municipal, County Board of Health and State Enforcement of Air Pollution Control

Section 2 of the Alabama Air Pollution Control Act of 1971 declares that the Act's policy and purpose is the achievement and maintenance of levels of air quality that will protect human health and safety and the environment. Section 2(c) states,

> "To these ends it is the purpose of this Act to provide for a coordinated state-wide program of air pollution prevention, abatement and control; to facilitate cooperation across jurisdictional lines in dealing with problems of air pollution not confined within a single jurisdiction; and to provide a framework within which all values may be balanced in the public interest."

It is obvious from the framework of the Act that the Air Pollution Control Commission is assigned the role of coordinator. Most sections of the Act deal with the powers, duties and procedures of the Commission. Actions to be taken by the Commission or authorized by it form the heart of regulatory activities. All activities by local programs, whether by county Boards of Health or by the sole municipality which qualified under section 15(b) are controlled, directly or indirectly, by the Commission. Thus, the Commission plays the key role in coordination, in providing continuity, and in supervision of both state and local programs.

Section 2(b) of the Act states that,

> "It is also declared that local air pollution control programs are to be provided for to the extent practicable as essential instruments for the securing and maintenance of appropriate levels of air quality."

Since only Huntsville, Alabama had a program in effect prior to July 1, 1969 other municipalities are barred from establishing a local program. As there are constitutional difficulties with a municipal reference ordinance program, local programs will be run by the county boards of health.

The relationship between the local programs and the state Commission is spelled out in section 15. Section 15(a) preempts the field of air pollution regulation for the state program. Following the preemption clause of section 15(a) the remainder of the section delineates certain permissible local programs which are subject to the control discussed in the preceding sections of this chapter. The Commission has flexible and varying tools to control the local programs in response to local conditions by means of the minimum standard requirements of section 15(b) the reporting requirements of section 15(f), the review procedures of section 15(e) and the suppression authority reserved in section 15(b).

CHAPTER III

PLEADING AND ENVIRONMENTAL LAW CASES IN ALABAMA

Environmental protection by its very nature is an interstate matter calling for cooperation between jurisdictions. The structure arranged for air pollution control by the Clean Air Act of 1970 with its reliance on interstate regions is illustrative of this fact. Yet the Clean Air Act delegates the primary responsibility for enforcement to the states.

Under the Alabama Air Pollution Control Act of 1971 most enforcement proceedings will be brought by the state's attorney general in a state court. The efficacy of the enforcement process will depend on the quality of environmental justice done in the state courts. Technical and scientific matters will be the subject of numerous interstate and state-federal conferences. It is to be hoped that the air pollution enforcement agency of each state will have close relationships not only with technical and administrative personnel from other levels of government, but also with out of state enforcement personnel. Under present arrangements, communication is easy and informal between the staff of the Division of Air Pollution Control and the Alabama Attorney General's office. For optimum enforcement efforts good communication will be needed between technical and enforcement personnel both on the state and federal level. Routine enforcement of violations of the Alabama Act can be carried on easily in the state courts by Alabama attorneys knowledgeable in the state's procedural peculiarities. Yet, it is probable that at some future date state enforcement proceedings will be brought which, though filed by the Commission and advanced by lawyers from the Alabama Attorney General's department, nevertheless call for the cooperation of out of state attorney's and enforcement personnel. In such a case, lawyers from the Department of Justice or enforcement personnel from the Environmental Protection Agency should have an understanding of just how different Alabama procedure is from the system followed in most American jurisdictions.

Because of Alabama's unique procedural system, these out of state lawyers will find it necessary to have the assistance of attorneys experienced in Alabama pleading and practice in any litigation brought in Alabama state courts. Even seasoned Alabama lawyers will probably have difficulty in bringing air pollution enforcement proceedings and other types of environmental actions successfully in state courts because of the ancient practices followed in requiring adherence to strict common law pleading and equity rules.

Alabama civil procedure differs from that used in the courts of her sister states and the federal courts. Leigh M. Harrison, former Dean of the University of Alabama School of Law, stated in a 1953 address to the Mobile Bar Association reprinted in Volume 6 of the Alabama Law Review at page 28 that,

> "Alabama has a modified system of common law pleading which has survived the reform movements during the past one hundred years without basic change. Most of our important statutes on pleading which are found in the Code of 1940 are also found in the Code of 1852."

The situation has not changed in 20 years. Alabama common law pleading calls for an extensive interchange of written statements based upon the ancient English system of writs which finally result in the definition of a single issue of law or fact for trial. The plaintiff in each suit, whether it be a public plaintiff represented by the Attorney General or a private plaintiff such as an automobile accident victim, has to choose a form of action which best describes the injury he has suffered. Procedure is intimately connected with the substance of the claim. The classic common law writs of trespass, trespass on the case, replevin, detinue, trover, assumpsit, debt, and covenant are terms of history for lawyers in most American jurisdictions but are terms of significance for Alabama lawyers who must be able to fit the injury of their client into a specific form of action and draft pleadings delineating that form of action in order to process their clients claim through the courts.

After the complaint is filed, the defendant examines the possibility of a demurrer to the complaint, attacking various aspects of the plaintiff's claim other than the merits. Terms such as specific traverse, plea in bar, plea in confession and avoidance long abandoned in most jurisdictions describe the ancient processes of common law pleading still in use in Alabama in the 1970s.

During the last 24 years the Federal Rules of Civil Procedure have become the bench mark procedural code in the United States. More than 27 states have adopted codes identical or closely similar to the Federal Rules 1 Barron and Holtzoff (Wright ed.) #9. Alabama is one of the few states not to have followed either the structural framework or borrowed heavily from them. Thus, Alabama lawyers do not have the ready use of the Rules' liberal devices designed for better and more efficient justice such as notice pleading, flexible joinder of parties, easy amendments, pre-trial conferences, and discovery. Finally, Alabama is one of the few jurisdictions in which law and equity continue to be separated.

All of this is very striking to the non-Alabama lawyer. If environmental lawsuits are tried in state courts it will be essential for them to be conducted by Alabama lawyers as a generation of American lawyers raised under the Federal Rules are unfamilar with the intricacies of common law and classical equity pleading. The philosophy and rules of Alabama pleading are indeed those of another procedural age.

Steps are being taken to change this by adopting a code of civil procedure in Alabama similar to that of the Federal Rules. The legislature has authorized the Supreme Court to promulgate a new system of rules and the Court's Advisory Committee has submitted a draft of new rules of Alabama civil procedure which are basically similar to the Federal Rules. The first draft has been circulated to the hundred or so members of the Alabama Law Institute and will be distributed to lawyers throughout the state this Fall with the view of soliciting their response so that the Supreme Court can take action by January 1973. Adoption of these proposed rules is by no means assured; a similar effort at procedural reform was defeated in 1957. One of the chief recommendations of our project is that the Chairman of the Alabama Air Pollution Control Commission join with the Attorney General in supporting the adoption of these proposed rules in order to make the successful handling of environmental law suits easier.

For a sharp distinction between the rules of Alabama pleading and the procedural system found in most American jurisdictions, we shall briefly discuss some of the distinctive features of the Federal Rules. Every procedural system serves certain functions. Pleadings give notice of the nature of a claim or defense, define and narrow the issues between the parties, state the facts which each party believes to exist, and sometimes provide a means for the Court to handle certain easily disposable claims quickly. Wright, Law of Federal Courts, 2d ed., pp. 255-260, 273-292.

Federal Rule 2 states that, "there shall be one form of action to be known as civil action." Thus, a plaintiff filing a complaint in a federal district court can combine equitable claims and claims for money damages. This is especially significant in the environmental field where quite frequently a public official such as the attorney general seeking to enforce the rights of the state will ask for injunctive relief, which an equity court can grant, joined with a claim for a civil penalty, a claim for money damages cognizable only in a court of law.

As shall be noted below, equity jurisprudence has developed doctrines which allow an equity court to take jurisdiction of demand for money as an ancillary claim. However, the general rule is that equitable and legal claims cannot be joined in the same suit and in Alabama courts equitable and legal claims must be filed on separate sides of the Court. The Federal Rules permit joinder of such claims, allowing them to be disposed of simply in one lawsuit unhindered by doctrinal complications. Environmental lawsuits often seek both legal and equitable relief and matters of proof are intermixed between the two claims. While the problem is not insurmountable, the split between law and equity would make the trial of a complicated air pollution case with extensive economic ramifications and technical proof more difficult.

Pleadings are not of great importance in a lawsuit filed in federal court where the purpose of the complaint is merely to give notice of the plaintiff's claim. Dioguardi v. Durning, 139 F.2d 744 (2d Circuit 1944); Conley v. Gibson, 355 U.S. 41, 78 Ct. 99 2 L. Ed. 2d 80 (1957); Sierocinski v. DuPont, 103 F.2d 843 (3d Cir. 1939). These leading cases, often cited for the proposition that a plaintiff in a lawsuit filed in federal court need only give notice of his claim and need not plead evidence, can be supplemented by scores of others. The Federal Rules require the plaintiff to give only a simple, clear and concise statement of his claim in order to get into court.

Pleadings are of vital significance in a common law jurisdiction such as Alabama. We have already mentioned that the complaint must be shaped to the mold of a specific form of action based on the English writ system which governs proof at trial and the remaining stages of the case.

Under the Federal Rules the plaintiff may make alternative and even inconsistent averments. As the plaintiff at common law is discouraged from pleading in the alternative or hypothetically, he uses the fiction of restating his claim in different counts in order to get around the possibility of a later fatal variance. A variance occurs when the proof at trial does not correspond to the allegations of the pleadings. Only immaterial variances may be corrected by the judge and the plaintiff must prove his case just as he described it in the complaint or lose. Thus, under common law pleading, the plaintiff has the possibility of pleading himself out of court. The results of this system survive in Alabama in complex pleadings such as the complaint in "Alabama Water Improvement Commission v. Mann Brothers Metal Plating, Inc." which is reproduced in the Appendix at page AIII-1. In this complaint, the language of the second count tracks the preceding one, changing only one word in case there should be a variation in evidence or characterization of evidence at the trial. It should be noted that each count stands alone and can not be read in connection with the preceding or following counts.

Joinder of parties presents a problem in Alabama. Although Alabama has legislatively softened the harsh common law rule against parties joining together in one complaint, Alabama courts have held that two persons who suffer injury as the result of the act of a single tort feasor cannot join in a suit against the defendant; each is required to sue separately. Brookside-Pratt Mining Co. v. McAllister, 196 Ala. 110, 72 So.2d 18 (S.Ct. 1916). Thus, in Alabama, the state and another party could not join as coplaintiffs in an environmental lawsuit. The tactic of joining private conservation groups with the state as coplaintiffs has been used effectively in some jurisdictions. An example of such a procedure is "State of New Mexico, et al. v. Arizona Public Service Co." No. 17994, New Mexico District Court, San Juan County in which the state and the Sierra Club are coplaintiffs. Federal Rule 20(a) permits the joinder of plaintiffs if the claims asserted arise out of the same transaction and common questions of law and fact are presented.

Great freedom in amending pleadings is allowed under Federal Rule 15. Alabama courts are guided by Title 7, sections 238-242 of the Alabama Code which sets stricter limitation on amendments.

Under the Federal Rules there are two basic pleadings: a complaint and an answer. Federal Rule 7 states that "there shall be a complaint and an answer. No other pleadings shall be filed, except that the court may order a reply to an answer or third party answer." This limitation on pleadings goes contrary to the grain of ancient common law practice and the practice used in Alabama courts in the 1970s where successive pleadings hone the suit for trial.

Basic to the Alabama pleading system is the testing of the plaintiff by demurrers, motions objecting to the legal sufficiency of the complaint. There are numerous opinions in the Alabama Reports which turn on the basis of an extremely technical construction of the pleadings. The Alabama rule that on demurrer a pleading must be construed most strongly against the pleader has resulted in many hair-splitting decisions. The cases gathered in Harrison, Cases on Alabama and Common Law Pleading, University of Alabama Press, 1941 at pages 1-14 are illustrative.

Federal Rule 12, which is the equivalent of common law demurrers and special pleadings, authorizes a variety of motions attacking pleadings. But it has been noted that motions under Federal Rule 12 are not favored and that federal judges deny them as a rule unless the allegations attacked have no possible relation to the controversy and are prejudicial to the defendant. Wright, Law of Federal Courts, supra, p. 277.

There are too many pitfalls in Alabama pleading. The reported cases give the impression that Alabama courts are more concerned with the pleadings of the parties than with the merits of the cases. Such a judicial attitude is especially unfortunate in a new area of law such as environmental protection. One fears that attorneys for the state might well never reach the merits of a controversial environmental case in a suit tried before an unfriendly judge who had all the weapons in the arsonal of common law pleadings to aid him in avoiding the issues.

Examples of pleadings illustrating some of the preceding problems are reproduced in the appendix. Under the Alabama Air Pollution Control Act of 1971 the Commission may bring a claim for civil penalties, seek injunctive relief, or combine a claim for money with a request for an injunction.

Many believe the key to reform of environmentally degrading practices lies in making the polluting activity unprofitable by using civil penalties as sanctions. Surprisingly, the Alabama Air Pollution Control Act of 1971 and Water Act of 1971 are a departure in Alabama legislation as these laws are the first to use civil penalties.

Section 17(a) of the Act states:

> "(a) Any person who violates any provisions of this Act, or any regulation adopted by the Commission, or who violates any determination or order of the Commission pursuant to this act, shall be liable to a penalty not to exceed $10,000 for said violation and an additional penalty not to exceed $10,000 for each day during which violation continues, which may be recovered by the Commission in civil action in the circuit court, and such person may be enjoined from continuing such violation."

A complaint seeking recovery of the statutory penalty alone, being a claim for money, would be filed in Circuit Court on the law side and would have to comply with the strict rules of common law pleading. The pleader would take care to draft a separate count of the complaint for each variation on his cause of action. If he wanted to sue an industry which spilled toxic chemicals into a stream he would go into great detail setting forth in parallel but separate counts the same story of what happened, varying the counts only to allege that in one the defendant acted willfully and in the other that he acted negligently. An example of such a complaint is "Water Improvement Commission, et al. v. Mann Brothers Metal Plating, Inc. et al.," a copy of which is reproduced at page AIII-1. Note the factual detail of the complaint. Note also that the language of count 1 and count 2 is identical except as to the allegations of negligence; count 1 alleging that the action was done willfully and count 2 that it was done negligently. This illustrates the care of the common law pleader in pleading the same claim in various ways in separate counts.

Note the allegations as to the date in the first sentence of count one which reads, "that heretofore on to wit, September 4, 1970." The phrase "to wit" is a word of art known as a videlicit. If a common law pleader alleges a time or date without prefixing a videlicit he must prove the time exactly as alleged in the complaint. Nelson v. Cutterboat and Motor Co., Inc., 260 Ala. 648 72 So. 2d 86, (S. Ct. 1954).

When the videlicit is used, however, the court permits wide variances in proof. In Pollack v. Gunter and Gunter, 162 Ala. 317, 50 So. 155 (S. Ct. 1909) the complaint alleged that a contract was made on "to wit" January 6, 1906 while proof at trial showed that the contract was made in August, 1901, a variance of five years. The court nevertheless permitted this variance since the date was alleged under a videlicit. There are other Alabama cases passing on the situation in which date is not preceded by the videlicit; if, on trial, proof of the date varies from the pleading, the plaintiff is barred from recovery.

The drafters of the Alabama Air Pollution Control Act of 1971 envisioned a unified form of action for enforcement of air pollution violations.

Section 17(a) of the Act states:

> "(a) Any person who violates any provisions of this Act, or any regulation adopted by the Commission, or who violates any determination or order of the Commission pursuant to this act, shall be

> liable to a penalty not to exceed $10,000 for said violation and an additional penalty not to exceed $10,000 for each day during which violation continues, which may be recovered by the Commission in civil action in the circuit court, and such person may be enjoined from continuing such violation."

This language speaks to one form of action such as that declared by Federal Rule 2 which allows disposition of equitable and legal claims in one suit and is the approach which would be envisioned by most American lawyers. The drafting of pleadings for a claim arising under section 17(a) would be a simple matter in other jurisdictions; a statement of the facts sketching the background of the pollution incident would be stated in a couple of paragraphs in simple, clear and concise language so as to give notice to the defendant and relief in the nature of a penalty or an order to abate the pollution or both would be prayed for in one complaint.

An Alabama attorney reading Section 17(a) would read it as a statute creating an equitable remedy. A suit for the civil penalty, being a claim for money which is to be filed in a law court, would normally not be recognized by an Alabama equity court. However, Alabama courts recognize the old equitable doctrine that where there is any ground of equity jurisdiction and a court of equity acquires jurisdiction to grant equitable relief that it will then retain the case to do complete justice. Tuskegee Homes Co. v. Oswald, 248 Ala. 64, 26 So.2d 865 (S. Ct. 1946). Thus, the Circuit Judge would recognize the existence of equitable jurisdiction on the basis of the claim for injunctive relief and would grant relief on the claim for the civil penalty as an ancillary claim. An example of a complaint seeking both equitable and legal relief is "State of Alabama v. Jere Beasley, Individually and as Acting Governor of Alabama, et. al." reproduced at page AIII-6.

A claim seeking equitable relief only is governed by Section 17(j) of the Act which states:

> "(j) The State Air Pollution Control Commission, the Attorney General, or any District Attorney, may file in the Circuit Court, sitting in equity, in the county in which the air contamination source is located, a bill or petition to enjoin the maintenance or operation of any air contamination source in violation of this act or any rule or regulation adopted pursuant to it. No bill or petition shall be filed by the Commission unless the filing of same has first been authorized by the Commission. The filing, presentation, and hearing of a bill or petition, as herein authorized, and the dissolution of any injunction issued pursuant thereto, and including appeals from the judgment of the Circuit Court, in Equity shall be governed by the general laws of the State of Alabama, which now or hereafter may govern applications for injunctive relief, except as herein provided. The Court shall not grant a temporary injunction unless it has a reasonable cause to believe that a respondent is operating or maintaining an air contamination source in violation of this act or in violation of any rule or regulation adopted pursuant thereto. The Court shall, upon final hearing, if the proof be sufficient, grant a final injunction restraining the respondent from operating or maintaining said air contamination source. No bond shall be required in any proceedings under this subsection.

Alabama equity pleading has its own special rules too, differing sharply from equitable claims pleaded in federal courts in the amount of detail which must be set forth. Lawyers pleading in federal courts know that under the rule of Conley v. Gibson, supra, only notice pleading is required, but they are aware that the well pleaded complaint may give more detail than that necessary to state an adequate complaint. Quite frequently, the legal draftsman chooses to flesh out the bare facts of the claim in order to give the judge and others reading the complaint a keener awareness of the issues in the suit. A suit filed in federal court seeking equitable relief for an environmental injury occurring in Alabama is "State of Alabama v. Corps of Engineers of the United States Army, et al," case #7258-72H in the United States District Court for the Southern District of Alabama, Mobile Division reproduced at page AIII-13.

The complaint, states a cause of action arising under the National Environmental Policy Act, 42 USC § 4231 et seq., and outlines simply and concisely the State's claim that the ecology of a vital estuarine area is being damaged by work proceeding under the direction of a private shell dredging company operating pursuant to a permit granted by the United States Army Corps of Engineers without the prior filing of an environmental impact statement as required by the National Environmental Policy Act.

A companion state court lawsuit was filed entitled "State of Alabama v. Radcliff Materials Corporation" in the Circuit Court of Baldwin County in equity. Copies of both complaints are reproduced in the Appendix and should be compared. The state complaint reproduced at page AIII-21 is much longer and goes into greater detail outlining specific instances whereby a nuisance has been committed by the shell dredging activities which underly both lawsuits.

The equitable complaint filed in the shell dredging lawsuit in Baldwin County which is a well pleaded bill reflects the tendency of Alabama pleaders to plead in great specificity and in great detail. This is exhibited in extreme form by the Complaint in "City of Tuscaloosa v. Duncan"; an action to enjoin the operation of a chicken coop in violation of a municipal ordinance. See Appendix page AIII-36.

The cases annoted under Equity Rules 11 through 38 (Appendix to Title 7, Michie edition of the Alabama Code of 1940 as amended) explain why Alabama lawyers plead in great detail in Equity cases. In Alabama Equity pleadings are not notice pleadings, quite the contrary. The pleader, or "orator" as he is called, is required to allege the facts which give rise to equity jurisdiction and which justify granting the prayed for relief. However artistically the pleadings are drawn or how pressing the need shown on trial, the only relief which the court can grant is that which is justified by the facts pleaded in the Bill of Complaint and proved on trial. Equity is not a forum which freely distributes justice on the basis of whatever the evidence at trial shows. Even though the equity plaintiff prays for general relief at the end of the complaint, the Alabama Supreme Court has held that the facts which justify granting relief must be alleged in the Bill of Complaint. See Stewart v. Snider, 197 Ala. 129, 72 So. 409 (1916). However, the required correspondence between proof and fact pleading presents little problem to the conscientious Alabama attorney who is familiar with the Equity Rules because the Courts allow liberal amendment of pleadings up to the time of the final decree. Alabama Equity Rule 28; Ex Parte Whitt, 238 Ala. 33, 189 So. 71 (S. Ct. 1939).

Most civil suits filed under the Alabama Air Pollution Control Act of 1971 will be filed in Equity because of the nature of the relief sought such as an injunction. However, the comparative liberality of Alabama equity pleading will attract the environmental plaintiff to the Equity side who will thus seek to avoid the stringencies of Alabama common law pleading. Yet out of state enforcement personnel and attorneys should be warned that Alabama equity pleading is not the liberal pleading of the Federal Rules. It too has its traps for the unwary though they are not as many or as dangerous as those of Alabama common law pleading.

At the present time, efforts are under way to draft a new system of procedure for Alabama which will be basically similar to the Federal Rules. It is in the interest of the Air Pollution Control Commission and representatives of the Attorney General's Environmental Enforcement Division that this be done. The complexities of environmental litigation should not be made more difficult by use of a procedural system which splits legal and equitable relief, which demands strict pleading of evidentiary facts, and which codifies ancient practices to the confusion of the modern practitioner. The Commission and the Attorney General should join in urging the Justices of the Alabama Supreme Court to promulgate a new set of rules similar to the Federal Rules of Civil Procedure.

CHAPTER IV

COMPLAINT FORMS

The legal complaint and equitable bill of complaint reproduced here are illustrative of the type of pleadings which will be filed by attorneys for the Commission. The complaint at page 4-2 is a claim for recovery of the civil penalty authorized by section 17 of the Act. This pleading should be compared with the complaint by the Water Improvement Commission against Mann Brothers reproduced at page A-III-1 which also seeks recovery of a civil penalty but unnecessarily pitches the claim on negligence theories.

The bill of complaint at pate 4-4 should be compared with the pleadings seeking injunctive relief reproduced at pages A-III-21 and A-III-36. Note that the draft bill of complaint at page 4-4 is shorter and simpler since the right to injunctive relief is based on a violation of the Act and the Rules and Regulations and the pleader is safe in restricting himself to a recital of those facts which show such a violation.

ALABAMA AIR POLLUTION CONTROL COMMISSION
A COMMISSION OF THE STATE OF ALABAMA:
STATE OF ALABAMA, EX REL WILLIAM J.
BAXLEY, ATTORNEY GENERAL OF THE
STATE OF ALABAMA,

PLAINTIFF

VS.

ALABAMA CHEMICAL, INC.
CORPORATION, AND X, XY, AND XYZ,
BEING THOSE PERSONS, PARTNERSHIPS
OR CORPORATIONS WHO ARE RESPONSIBLE
FOR THE DAMAGES TO THE PLAINTIFF AS A
RESULT OF ITS NEGLIGENCE WHICH WAS
DISCOVERED ON TO-WIT AUGUST 1, 1972,
TRUE NAMES AND IDENTITIES ARE OTHER-
WISE UNKNOWN BUT WILL BE ADDED BY
AMENDMENT WHEN ASCERTAINED,

DEFENDANT

IN THE CIRCUIT COURT

OF SUMTER COUNTY,

ALABAMA, AT LAW

CASE NO. ______

COMPLAINT

The Plaintiff claims of the Defendant Ten Thousand and No/100 Dollars ($10,000.00) for that heretofore on to-wit, August 1, 1972, and at the present time, said Plaintiff is the duly qualified agency of the State of Alabama created pursuant to Title 22, Section 310(4) Code of Alabama 1940, as amended, known as the Air Pollution Control Commission; that said Plaintiff is the proper agency for the State of Alabama for the protection, improvement and conservation of the air quality of the State of Alabama;

That on to-wit, August 1, 1972 and prior times thereto, the Defendant was engaged in the operation of a sulfuric acid manufacturing plant at or near the city of York, Sumter County, State of Alabama; that as a part of its operation, said Defendant released sulfur dioxide tail gas emissions into the air; that the Defendant had a duty to obey the Rules and Regulations of the Alabama Air Pollution Control Commission pursuant to Title 22, Section 310(17)(a) Code of Alabama 1940, as amended; that Section 52 of the Air Pollution Control Commission's Rules and Regulations reads as follows,

> "Sulfuric Acid Plants. No person shall cause or permit sulfur dioxide tail gas emissions from sulfuric acid manufacturing plants to exceed 6.5 lb/ton of 100 percent sulfuric acid produced . . . .";

that in the operation of its plant said Defendant permitted or caused sulfur dioxide tail gas emissions to be released into the air in excess of 6.5 lb/ton of 100 percent sulfuric acid produced; that the release by said Defendant of the said sulfur dioxide tail gas emissions into the air was discovered by the Plaintiff on to-wit, August 1, 1972.

Plaintiff avers that the sulfur dioxide tail gas emissions were caused or permitted to be released into the air of the State of Alabama by the Defendant as aforesaid; Plaintiff further avers that it has directed the Attorney General of the State of Alabama to file suit for recovery of the penalty from the Defendant pursuant to Title 22, Section 310(17)(e) Code of Alabama 1940 as amended.

Alabama Air Pollution Commission

By ______________________________
WILLIAM J. BAXLEY
ATTORNEY GENERAL

STATE OF ALABAMA, EX REL	)	IN THE CIRCUIT COURT
WILLIAM J. BAXLEY, ATTORNEY GENERAL	)	OF TUSCALOOSA COUNTY,
COMPLAINANT	)	ALABAMA
V.	)	
SCRAP METALS, INC.		
RESPONDENT	)	IN EQUITY

BILL OF COMPLAINT

To the Honorable Judge in Equity sitting:

Comes now the State of Alabama, by and through its Attorney General, William J. Baxley, who alleges the following facts and averments upon which it hereinafter prays for relief:

1. That as Attorney General, William J. Baxley is privileged to initiate this faction in the name of the State of Alabama, according to the provisions of Title 7, §§ 1081 and 1084, and Title 22, § 310(17)(c) Code of Alabama 1940 as amended;

2. That the respondent has been and is doing business in Tuscaloosa County, Alabama.

3. That respondent Scrap Metals, Inc. is a corporation presently engaged in salvage operations converting abandoned automobiles into scrap metal. The operation of respondent's installation results in the discharge into the atmosphere of dense black smoke and particulate matter in violation of the laws of Alabama. In the process of conducting its operation respondent starts a fire inside the automobile by burning a tire which in turn ignites the inflammable material inside the automobile, allowing it to burn until nothing remains except scrap metal. The open

burning results in the discharge of particulate matter, carbon monixide, hydrocarbons, and oxides of nitrogen and smoke of a shade or density darker than that designated as No. 1 on the Ringlemann chart.

4. That respondent had and has a duty to obey the Alabama Air Pollution Control Rules and Regulations (hereinafter "Rules") pursuant to Title 22, § 310(17)(a) Code of Alabama 1940 as amended.

5. That Section 4.1.1 of the Rules promulgated by the Air Pollution Control Commission states that,

> "No person shall discharge into the atmosphere from any single source of emission whatsoever any air contaminant of a shade or density darker than that designated as #1 on the Ringlemann chart or 20% opacity."

6. That Section 3.1 of the Rules prohibits open burning such as that practiced by the respondent in its operations.

7. That the Attorney General is empowered by Title 22, Section 310(17)(J) to initiate action to enjoin the maintenance or operation of any air contamination source in violation of Alabama Air Pollution Control Act of 1971 or any rule or regulation adopted pursuant to it.

8. That the emission, discharge, and deposit of said pollutants into the atmosphere by the respondent constitute an air contamination source in violation of the Alabama Air Pollution Control Act of 1971, Title 22, Section 310; that the discharges constitute a public nuisance; that the amounts and types of said emissions are unreasonable and materially interfere with the use and the enjoyment of people of ordinary sensibilities of their property; that said pollutants are injurious and damaging to the life, and health and well-being of the people of Alabama, that said pollutants greatly increase the risk of respiratory disease to the people of Alabama and cause immeasurable property damage and irreparable injury; that the discharge and emission of said pollutants as aforesaid by said respondents are of a continuous and recurring nature

which deprive the inhabitants of the state of Alabama of their rights to pure air and the comfortable enjoyment of their property and that petitioner has no adequate remedy at law; and that the injury to petitioner and the citizens of the state of Alabama can only be prevented by the abatement of the acts of said respondent in polluting the air and atmosphere.

WHEREFORE, THE PREMISES CONSIDERED, your petitioner prays that the respondent named herein be made party to this Bill of Complaint and that proper process be issued to it requiring it to plead, answer or demur within the time prescribed by law or cause a decree pro confesso to be issued against it; and upon hearing the proof that Your Honor will award the following relief;

a) an order to respondent that the emission and discharge of said pollutants in the air or atmosphere be abated.

b) that the respondent be permanently enjoined from emitting and discharging smoke and particulate matter into the air in violation and regulations of the Alabama Air Pollution Control Rules and Regulations.

c) that the respondent be permanently enjoined from emitting and discharging into the air smoke of a shade or density darker than that designated as No. 1 on the excess Ringelmann Chart.

7. Your petitioner prays for all other, further and different relief to which it may be entitled under the premises.

8. Petitioner submits itself to the jurisdiction of this court and offers to do equity.

Respectfully submitted,

William J. Baxley
Attorney General

Subscribed and sworn to before me this day of , 1972.

CHAPTER V

EMERGENCY ACTION COMPLAINT

The bill of complaint reproduced at page 5-2 seeks injunctive relief in an emergency situation declared pursuant to the provisions of section 11. Each bill of complaint seeking a temporary restraining order under section 11 will be different because each must state the varying facts which justify the granting of equitable relief along with the particular regulation or statute defining the duty breached by the respondent in that particular case. The Rules and Regulations should be studied carefully and used as the basis for drafting the bill of complaint.

STATE OF ALABAMA, EX REL WILLIAM J. BAXLEY, ATTORNEY GENERAL, COMPLAINANT VS. VULCAN SCRAP METALS, INC. RESPONDENT	IN THE CIRCUIT COURT OF TUSCALOOSA COUNTY, ALABAMA IN EQUITY CASE NO. ________

BILL OF COMPLAINT

TO THE HONORABLE JUDGE IN EQUITY SITTING:

Comes now the State of Alabama, by and through its Attorney General, William J. Baxley, who alleges the following facts and the averments upon which it hereinafter prays for relief:

1. That the complainant, State of Alabama, by and on behalf of William J. Baxley as Attorney General, brings this action pursuant to Title 7, Sections 1081 and 1084 and Title 22, Section 301(17)(j) of the Code of Alabama 1940, as amended; that at the time of filing this Bill of Complaint William J. Baxley was and now is the duly elected, qualified and acting Attorney General of the State of Alabama;

2. That the respondent Vulcan Scrap Metals, Inc. is a corporation presently engaged in open burning and salvaging abandoned automobiles in Tuscaloosa County. In the nature of conducting its business, defendant burns materials emitting dense clouds of smoke and releasing particulate matter into the air of Tuscaloosa County, Alabama.

3. That on to wit July 1, 1972, William Willis, the Director of the

Division of Air Pollution Control declared that a continuing generalized condition of air pollution existed in Tuscaloosa County and that it created an emergency requiring immediate action to protect human health and safety.

4. That on to wit July 2, 1972 at 9 a.m. the Director after consulting with representatives of the Tuscaloosa County Board of Health ordered respondent to immediately discontinue the emission of air contaminants and gave notice to respondent of a hearing to be held before the Alabama Air Pollution Control Commission at 10:00 a.m. on July 3, 1972 to determine whether the said order should be affirmed, modified, or set aside.

5. That on to wit July 3, 1972 at 10:00 a.m. the Alabama Air Pollution Control Commission met for a hearing pursuant to Title 22, Section 310(11)(a) and affirmed the said order of the Director.

6. That William Willis, Director of the Division of Air Pollution Control thereafter contacted James Brown, manager and president of Vulcan Scrap Metals, Inc., and informed him of the Commission's affirmation of the said order and ordered him to discontinue the emissions from the open burning and salvage operations for the duration of the emergency. Despite this order from a representative of the Department of Health and the County Board of Health, Respondent Vulcan Scrap Metals, Inc. continues its open burning of materials from abandoned automobiles and continues to discharge and release into the air dense clouds of smoke and particulate matter.

7. That Respondent is under a duty to obey the said order of the Director pursuant to Section 2.7.2 of Alabama Air Pollution Control Rules and Regulations (hereinafter "Rules") which states,

> "when the director declares such a local episode, any person responsible for the operation from which excess emissions result, shall shut down such an operation and make repairs or alter the process as required by the director to restore normal operations."

8. That Respondent has the duty to comply with the Rules under Title 22, Sec. 310 (17)(a) of the Code of Alabama 1940 as amended and the Respondent has the duty to comply with the orders of the Director in an air pollution emergency pursuant to Title 22, Sec. 310 (11)(a) of the Code of Alabama 1940 as amended.

9. That on to wit July 3, 1972 and at all pertinent dates hereafter the Respondent has continued its open burning operations resulting in the discharge of large amounts of dense smoke and particulate matter into the air.

10. That Respondent's operations,if sustained, will cause a substantial threat to the health of persons in the Tuscaloosa area by contributing to the high level of particulate matter in the air pollution emergency. Due to the continuing emergency condition all other means of relief are inadequate to protect the health of the people of Tuscaloosa County, Alabama who will suffer immediate and irreperable harm to their health unless the Respondent is immediately restrained from emitting contaminants into the air for the duration of the emergency.

11. That the emission and discharge of the said pollutants into the air and atmosphere by the Respondent constitutes a public nuisance; that the amount, type and quality of the emissions and discharge materially interferes with the use and enjoyment of people of ordinary sensibilities of their property; that the said pollutants are injurious and damaging to the life, health and well-being of the inhabitants of Tuscaloosa County, Alabama; that the discharge and release of these pollutants as aforesaid by Respondent is of a continuing and recurring nature, depriving the inhabitants of Tuscaloosa County, Alabama of their right to pure air and the comfortable enjoyment of their property; and that to allow the said respondent to continue to discharge and deposit these pollutants in the air and atmosphere would injure the lives and health

of the inhabitants of Tuscaloosa County, Alabama.

WHEREFORE, THE PREMISES CONSIDERED, your Complainant prays that the Respondent named herein be made party to this Bill of Complaint and that proper process be issued to it requiring it to plead, answer or demur within the time prescribed by law or cause a decree pro confesso to be issued against it; and upon hearing the proof that Your Honor will award the following relief:

1. That the release and discharge of the said pollutants into the air or atmosphere by respondents be abated for the duration of the said emergency.

2. That this Court issue a Temporary Restraining Order enjoining the Respondent from releasing or discharging the said pollutants into the air and atmosphere for the duration of the said emergency.

3. That after a hearing on this matter that Respondent be permanently enjoined from releasing and discharging the said pollutants into the air and atmosphere for the duration of the said emergency.

4. Your Complainant prays for all other, further and different relief to which it may be entitled under the premises.

Your Complainant offers to do equity.

Respectfully submitted

WILLIAM J. BAXLEY,
ATTORNEY GENERAL

STATE OF ALABAMA, EX REL
WILLIAM J. BAXLEY, ATTORNEY GENERAL,
COMPLAINANT
VS.
VULCAN SCRAP METALS, INC.
RESPONDENT

IN THE CIRCUIT COURT
OF TUSCALOOSA COUNTY,
ALABAMA

IN EQUITY
CASE NO. _________

AFFIDAVIT

William Puller being duly sworn deposes and says:

1. I am a Meteorologist with the Atmosphere Research Laboratories of the National Oceanic and Atmosphere Administration;

2. Since January, 1970, I have been assigned to the Environmental Protection Agency and have been involved in work in air pollution control;

3. As part of my duties, I assist the Environmental Protection Agency's concern with air pollution emergencies throughout the country;

4. On Monday, June 30, 1972, in the course of my duties of observing national weather conditions, I became aware that the National Weather Service Forecast Office in Birmingham had issued an Air Stagnation Advisory for the Tuscaloosa area;

5. An Air Stagnation Advisory is issued when winds are calm and atmospheric conditions are such that there is limited vertical mixing of pollutants.

During these conditions, due to the lack of winds to move pollutants out of the area, and the limited height to which pollutants can rise, unless emissions of pollutants are curtailed or terminated, the concentrations of such pollutants will increase;

6. At this time the Air Stagnation Advisory is still in effect. Although there is a frontal system moving in from the west which is expected to gradually improve weather conditions, i.e., increase dispersion characteristics of the atmosphere, it is expected that the Advisory will continue in effect until at least 11:00 a.m. on July 6, 1972, and that although the Advisory may be terminated at that time, dispersion will still be poor for some time thereafter. If the frontal system should slow down or stop, it will result in the extension of the Advisory until such time as the frontal system reaches the Tuscaloosa area;

7. Until such time as weather conditions improve, the continued emissions of pollutants in the same quantities as have been emitted in the last seven days will cause concentrations in the atmosphere to remain at existing levels or to increase.

WILLIAM PULLER

Sworn to and subscribed before
me this the _______ day of
July, 1972.

NOTARY PUBLIC
My commission expires

STATE OF ALABAMA, EX REL
WILLIAM J. BAXLEY, ATTORNEY GENERAL,
COMPLAINANT
VS.
VULCAN SCRAP METALS, INC.
RESPONDENT

IN THE CIRCUIT COURT
OF TUSCALOOSA COUNTY,
ALABAMA

IN EQUITY
CASE NO. ________

AFFIDAVIT

James Kent, Acting Chief, Epidemiology Branch of the Department of Public Health of the State of Alabama, being duly sworn deposes and states:

1. I, James Kent, am the Acting Chief of the Epidemiology Branch of the Department of Health of the State of Alabama;

2. I have received a Bachelor of Science Degree and a Doctor of Medicine Degree from Tulane University, and a Master of Public Health Degree from Harvard University. I have completed my Speciality Boards in General Preventive Medicine. I have worked full time in the field of air pollution health effects research since 1968.

3. It is my opinion that exposure to suspended particulate levels of 1000 micrograms per cubic meter per twenty-four hours in the ambient air for a single twenty-four hour period would constitute an imminent and substantial endangerment to the health of persons, i.e., an immediate and serious threat of signifi-

cant harm to the health of a significant portion of the general population.

4. Furthermore, it is my opinion that exposure to ambient particulate levels of greater than 700 micrograms per cubic meter per twenty-four hours for two consecutive days would constitute an equivalent endangerment to the public health.

JAMES KENT

Sworn to and subscribed before
me this the ______ day of
July, 1972.

NOTARY PUBLIC

My commission expires

STATE OF ALABAMA, EX REL
WILLIAM J. BAXLEY, ATTORNEY GENERAL
COMPLAINANT
VS.
VULCAN SCRAP METALS, INC.
RESPONDENT

IN THE CIRCUIT COURT
OF TUSCALOOSA COUNTY,
ALABAMA

IN EQUITY
CASE NO. ______

AFFIDAVIT

Charles Johnston, Assistant Director of the Tuscaloosa County Board of Health, being duly sworn deposes and states:

1. I am the Assistant Director of the Board of Health for Tuscaloosa County, Alabama;

2. As part of my duties I supervise the air pollution control program for Tuscaloosa County Health Department, including the collection and analysis of air quality data;

3. A sample of particulate matter, collected by a standard high volume air sampler, indicated a particulate level of 771 micrograms per cubic meter of air for the time period beginning 2:00 p.m., June 30, 1972, and ending at 8:00 a.m., July 1, 1972, in Tuscaloosa;

4. A later sample from the same location indicated a particulate level of 722 micrograms per cubic meter of air for the time period beginning at 5:00 p.m.,

June 30, 1972, and ending at 2:30 p.m. on July 1, 1972;

5. A later sample at the same location, indicated a particulate level of 758 micrograms per cubic meter of air for the time period beginning 8:00 a.m. on July 1, 1972, and ending at 8:00 a.m., July 2, 1972;

6. A later sample at the same location, indicated a particulate level of 728 micrograms per cubic meter of air for the time period beginning at 2:30 p.m. on July 2, 1972 and ending at 2:30 p.m., July 3, 1972;

7. For the forty-five hours ending at 2:30 p.m. on July 3, 1972, the average particulate level was 725 micrograms per cubic meter of air.

____
CHARLES JOHNSTON

Sworn to and subscribed before
me this the ________ day of
July, 1972.

____
NOTARY PUBLIC

My commission expires

STATE OF ALABAMA, EX REL)
WILLIAM J. BAXLEY, ATTORNEY GENERAL)
COMPLAINANT)
VS.)
VULCAN SCRAP METALS, INC.)
RESPONDENT)

IN THE CIRCUIT COURT
OF TUSCALOOSA COUNTY,
ALABAMA

IN EQUITY
CASE NO. ________

AFFIDAVIT

William Willis, Director of the Division of Air Pollution Control of the Department of Public Health, being duly sworn deposes and states:

1. I, William Willis, am Director of the Division of Air Pollution Control of the Department of Public Health.

2. As part of my duties I consult with personnel monitoring the air pollution control program throughout the State of Alabama. On or about July 1st, 2nd, and 3rd, 1972, I was informed by Charles Johnston, Assistant Director of the Tuscaloosa County Board of Health of continuing high levels of particulate matter in the air in Tuscaloosa County.

3. As part of my duties I consult with meteorologists concerning atmospheric conditions throughout the State of Alabama. On or about June 30, 1972, I was informed by William Puller, meteorologist with the Atmosphere Research Laboratories of the National Oceanic and Atmosphere Administration that an Air Stagnation Advisory had been issued for the Tuscaloosa area and was further informed by William Puller on or about July 2, 1972 that it was expected to

continue in effect until at least July 6, 1972. William Puller informed me that unless emissions of the pollutants were decreased, the concentrations of the pollutants in the air of Tuscaloosa County would increase.

4. As part of my duties I consulted with James Kent, Acting Chief, Epidemiology Branch of Department of Public Health who informed me that the continued exposure to the existing level of pollutants in the air in Tuscaloosa County constituted a danger to human health.

5. On to wit July 1, 1972, I declared an air pollution emergency in Tuscaloosa County and issued an order to various enterprises including Respondent, Vulcan Scrap Metals, Inc. to immediately discontinue the emission of air contaminants. Respondent did not obey this order but continued its operations.

6. On or about July 2, 1972, at 9:00 a.m. I notified Respondent of a hearing before the Alabama Air Pollution Control Commission to consider affirmation of the order to close operations. The Commission affirmed the said order on or about July 3, 1972, at 10:30 a.m. Respondent was notified of the Commission's decision but has not complied with the said order.

WILLIAM WILLIS

Sworn to and subscribed before
me this the ________ day of
July, 1972.

NOTARY PUBLIC
My commission expires

CHAPTER VI

INDEX OF VIOLATIONS, ENFORCEMENT PROCEDURES, AND FORMS

Chapter VI is comprised of three indexes designed to aid those unfamiliar with the Alabama Air Pollution Control Act of 1971. They are oriented more toward aiding a District Attorney or Assistant Attorney General in his first encounters with the Act rather than Commission personnel. The indexes of violations and enforcement procedures are designed to be used independently of this report while the index of forms refers to the pleadings reproduced in the appendix and chapters IV and V.

CHAPTER VI

INDEX OF VIOLATIONS, ENFORCEMENT PROCEDURES, AND FORMS

Chapter VI is comprised of three indexes designed to aid those unfamiliar with the Alabama Air Pollution Control Act of 1971. They are oriented more toward aiding a District Attorney or Assistant Attorney General in his first encounters with the Act rather than Commission personnel. The indexes of violations and enforcement procedures are designed to be used independently of this report while the index of forms refers to the pleadings reproduced in the appendix and chapters IV and V.

Index of Violations

Burning, during an emergency - Act §§ 11(d)(5)

Carbon monoxide emissions --
  restrictions for petroleum cracking system Rules 7.2
  restrictions for steel industry - Rules 7.1

Circumvention by concealment of emissions - Rules 1.14

Concealment of emissions - Rules 1.14

Construction of air contamination source --
  definition of - Act § 8(c)
  failure to receive permit for - Act §§ 8(a), 18(4)

Cotton gins, emission specifications for - Rules 4.6

Cupola, small foundry - see Foundry cupola, small

Dust, fugitive - see Fugitive dust, infra

Emergency, air pollution, powers of Governor during --
  burning - Act § 11(d)(5)
  fuel consumption - Act § 11(d)(4)
  incinerators - Act § 11(d)(3)
  motor vehicle use - Act § 11(d)(1)

Emission control device, motor vehicle - Act § 16(c)(3)

Emission control equipment --
  failure to obtain permit for - Act § 18(4)
  shut down because of malfunction, failure to report - Rules 1.10.2
  shut down for maintenance, failure to report - Rules 1.10.1

Emissions --

- carbon monoxide - see Carbon monoxide emissions supra
- cotton gins - see Cotton gins, supra
- fuel burning - see Fuel burning, infra
- fugitive dust - see Fugitive dust, infra
- hydrocarbon - see Hydrocarbon emissions, infra
- motor vehicle - see Motor vehicles, control of emissions of, infra
- nitrogen oxide - see Nitrogen oxide emissions, infra
- organic solvents - see Organic Solvents, infra
- process industries - see Process industries, infra
- small foundry cupola - see Foundry cupola, small, infra
- sulfur compound - see Sulfur compound emissions, infra
- visible - see Visible emissions, infra
- volatile organic materials - see Volatile organic materials, infra
- waste gas disposal - see Waste gas disposal, infra

Emissions, concealment of - Rules 1.14

Episode, air pollution --

- criteria for - Rules 2.2
- declaration by director - Act § 11(a), Rules 2.1
- general episode - Rules 2.6
- specific locality episode - Rules 2.3.3, 2.7
- specific pollutant episode - Rules 2.3.2
- two contaminant episode - Rules 2.5

Equipment, monitoring, failure to maintain - Act § 7, Rules 1.7

False information, submission of to Commission - Act §§ 7, 17(d), 18(2), Rules 1.17

Foundry cupola, small --
    emission specifications for - Rule 4.5

Fuel, use during an emergency - Act § 11(d)(4)

Fuel burning --
    equipment for, definition - Rules 1.2.1
    nitrogen oxide emissions from - Rules 8.1
    particulate emissions from --
        new sources -
            emission specifications for - Rules 4.3.4
        old sources in use -
            emission specifications for Class 1 counties - Rules 4.3.1
            emission specifications for Class 2 counties - Rules 4.3.2
    sulfur emissions from -
        new sources -
            emission specifications for - Rules 5.1.4
        old sources -
            emission specifications for Class 1 counties - Rules 5.1.1
            emission specifications for Class 2 counties - Rules 5.1.2

Fugitive dust --
    abatement of dust when nuisance - Rules 4.2.3
    defined - Rules 1.2.1
    prohibition against emission beyond lot line - Rules 4.2.2
    required precautions against - Rules 4.2.1

Hydrocarbon emissions --
- organic solvents -
  - definition - Rules 6.6.8, 6.6.7
  - disposal of - Rules 6.7
  - emission restrictions - Rules 6.6.1, 6.6.2
  - reduction of emissions - Rules 6.6.4, 6.6.5
- volatile organic materials -
  - definition - Rules 1.2.1, 6.1.2, 6.2.3
  - loading facilities for - Rules 6.2
  - pumps and compressors for - Rules 6.4
  - storage facilities for - Rules 6.1
  - water separation from - Rules 6.3
- waste gas disposal - Rules 6.5

Incinerator --
- definition - Rules 1.2.1
- emission specifications - Rules 3.2
- use during an emergency - Act § 11(d)(3)
- wood by-products incineration emission specifications - Rules 3.3

Information, failure to submit - Act §§ 7, 18(2), Rules 1.7

Information, false - see False information

Inspections, refusal to allow - Act § 9(a)

Maintenance, emission control equipment --
- failure of - Act § 8(d)
- failure to report shut down for - Rules 1.10.1

Malfunction, emission control equipment, failure to report shutdown for -- Rules 1.10.2

Monitoring, failure to maintain equipment for - Act § 7, Rules 1.7

Motor vehicles --

    control of emissions of - Act § 16(a)

    emission control device - Act § 16(c)(3)

    use during an emergency - Act § 11(d)(1)

Nitric acid manufacturing nitrogen oxide emissions from - Rules 8.2

Nitrogen oxide emissions --

    combustion sources, new - Rules 8.1

    nitric acid manufacturing - Rules 8.2

Nuisance, dust - Rules 4.2.3

Open burning --

    defined - Rules 1.2.1

    exceptions - Rules 2.1.1 ff

    prohibition against - Rules 2.1

Orders by Commission, violation of - Act § 6(b)

Organic materials, volatile - see volatile organic materials,infra

Organic solvents --

    definition - Rules 6.6.8, 6.6.7

    disposal of - Rules 6.7

    emission restrictions - Rules 6.6.1, 6.6.2

    reduction of emissions - Rules 6.6.4, 6.6.5

Particulate emissions --

- cotton gins, emission specifications for - Rules 4.6
- fuel burning equipment - see fuel burning, supra
- fugitive dust - see fugitive dust, supra
- process industries - see process industries, infra
- small foundry cupola, emission specifications for - Rules 4.5
- visible emissions -
  - specifications for stationary source - Rules 4.1.1
  - specifications for mobile sources - Rules 4.1.2

Permits --

- for construction of air contamination source, failure to obtain -
  Act §§ 8(a), 18(4) - Rules 1.12
- for pollution control device, failure to obtain - Act § 18(4) - Rules 1.12
- violation of terms of - Act § 18(4)

Privileged information, unauthorized disclosure of - Act § 14 - Rules 1.5.5

Process industries --

- new sources -
  - emissions specifications for - Rules 4.4.4
- old sources -
  - emission specifications for Class 1 counties - Rules 4.4.1
  - emission specifications for Class 2 counties - Rules 4.4.2

Records, failure to submit - Act §§ 7, 18(2), Rules 1.7

Records, false - see False information, submission of to Commission, supra

Sampling, failure to allow - Act § 9(b), Rules 1.8.3

Solvents, organic - see Organic solvents, supra

- Standards, ambient air quality, lack of - Rules 1.11
- Sulfur compound emissions --
    - fuel combustion -
        - new sources -
            - emission specifications for - Rules 5.1.4
        - old sources -
            - emission specifications for Class 1 counties - Rules 5.1.1
            - emission specifications for Class 2 counties - Rules 5.1.2
    - sulfuric acid plants, specifications for sulfur dioxide and trioxide gas emitted from - Rules 5.2
    - sulfur recovery plants -
        - recovery from natural gas - Rules 5.3.1
        - recovery from all other sources - Rules 5.3.2
- Sulfuric acid plants, emissions of sulfur dioxide and trioxide gas from - Rule 5.2
- Sulfur recovery plants --
    - recovery from natural gas - Rules 5.3.1
    - recovery from all other sources - Rules 5.3.2
- Tests, refusal to allow - Act § 9(b) - Rules 1.8.3
- Trade secrets - see privileged information, unauthorized disclosure of, supra
- Visible emissions --
    - specifications for stationary source - Rules 4.1.1
    - specifications for mobile source - Rules 4.1.2

Volatile organic materials --
    definition - Rule 1.2.1, 6.1.2, 6.2.3
    loading facilities for - Rules 6.4
    storage facilities for - Rules 6.1
    water separation from - Rules 6.3

Waste gas disposal - Rules 6.5

Wood by-products incineration - see incinerator, wood by-products, supra

Index of Enforcement Procedures

Civil penalties, recovery of - Act §§ 17(a), 17(b), 17(c)

Commission, enforcement of provisions of Act by - Act § 15(g)

Construction--
  prohibition of - Act § 8(a)
  regulation of by permit - Act § 18(1), Rules 1.12.1(a)
  requirement of notice to Director prior to undertaking - Act § 8(a)

Control regulation, defined - Rules 1.2.1

Control strategy, defined - Rules 1.2.1

County Boards of Health--
  limitations of authority to enforce - Act §§ 15(c), 15(d)(3)
  power to enforce air pollution control program - Act §§ 15(c), 15(d)(3)
  power to enforce orders of Governor during air pollution emergency - Act § 11(g)

Emergency, air pollution, powers of Director during - Act §§ 11(a), 11(b), Rules 2.1

Emergency, air pollution, powers of Governor during--
  burning - Act § 11(d)(5)
  commercial activity - Act § 11(d)(2)
  fuel consumption - Act § 11(d)(4)
  incinerators - Act §11(d)(3)
  industrial activity - Act § 11(d)(2)
  manufacturing - Act § 11(d)(2)
  motor vehicle travel - Act § 11 (d)(1)
  retail activity - Act 11(d)(2)

Emergency, air pollution, powers of State Health Officer during-- Act § 11(d)

Emergency procedure, order to reduce or discontinue emissions--
  during generalized condition - Act §11(a), Rules 2.4
  from one or more sources - Act § 11(b)

Governor's orders during an emergency, persons authorized to enforce - Act § 11(g)

Governor's powers during an emergency - See Emergency, air pollution, powers of Governor during

Hearings, rules of evidence - Rules 1.13.4

Injunctive relief - Act §§ 17(a), 17(j)

Inspections, power to make--
  motor vehicles - Act § 16(b(1)
  property and premises - Act §§ 9(a), 9(b)

Local police, power to enforce orders of Governor during an air pollution emergency - Act § 11(g)

Monitoring equipment, requirement to install, use, and maintain - Act § 7

Motor vehicles, certificate of inspection--
  failure to comply - Act §§ 16(c)(3), 16(c)(4), 16(c)(5)
  issuance of - Act § 16(b)(3)
  refusal to issue - Act § 16(c)(2)
  revocation of - Act §16(c)(1)

Motor vehicles, enforcement procedures--
  authority to inspect - Act § 16(d)
  defined - Act § 16(e)
  inspections, fee for - Act § 16(b)(2)
  inspections, power to establish standards for - Act § 16(b)(1)
  penalty for failure to comply - Act §§ 16(c)(5), 17(a), 17(d)

Municipal governing bodies--
  limitations, Act § 15(d)(3)
  power to enforce municipal ordinances - Act §§ 15(b), 15(b)(2), 15(d)

National Guard, activities in air pollution emergency - Act § 11(g)

Orders, power to issue and enforce--
  by Commission - Act § 6(b)
  by Governor - Act §§ 11(c), 11(d)

Penalties--
  citations - Act §§ 17(e), 17(f)
  civil penalties - Act §§ 17(a), 17(b), 17(c)
  criminal penalties - Act § 17(d)
  injunction - Act §§ 17(a), 17(j)

Permits--
  construction of air contamination source, failure to obtain - Act §§ 8(a), 18(4), Rules 1.12.1(a)
  denial of - Rules 1.12.8(a), 1.12.8(b)
  discretion of Director in requiring - Rules 1.12.1(3)
  operation, regulation of by permit - Act §18(4), Rules 1.12.1(b)
  permission to operate equipment - Act §§ 18(1), 18(4), Rules 1.12.1(b)
  pollution control device, failure to obtain a permit for - Act § 18(4)
  revocation of - Act § 18 (3)
  violation of terms of - Act §§ 18(4), 17(a), 17(d)

Private Remedies - Act § 15(a)

Property, entry upon violation of order - Act § 11(g)(1)

Records and reports--
  access to by Commission - Act § 6(c)
  requirement to establish and maintain - Act § 7

Search warrant, necessity of - Act 11(g)

Shut-down of operations - Act §§ 11(a), 11(b), 11(d), 17(a), Rules 2.7.2

State Department of Health, power to enforce orders of Governor during air pollution emergency - Act § 11(g)

Subpoena powers - Act §§ 6(a), 11(h)

Temporary injunction - Act § 17(j)

Testing and sampling devices, requirement to maintain - Act §§ 7, 9(b), Rules 1.12.8(c)

Variances--
    conditions imposed in granting - Act § 12(b)
    discretion of Director in granting - Act § 12(f)
    duration of - Act § 12(c)
    failure of Commission to act upon request - Act § 12(e)
    granting of - Act § 12(a)
    procedure in filing for - Act § 12(d)

Violation, or failure, or refusal to obey or comply with Act, Rules and Regulations - Act § 17(d)

Witnesses, authority to compel attendance of at hearings - Act § 6(a)

INDEX OF FORMS

Civil Penalty, recovery of pp. 4-2, A-III-1, A-III-6

County Boards of Health
- citation p. A-II-1
- permits p. A-II-2 et seq.
- quarterly reports p. A-II-10

Emergency, air pollution p. 5-1 et seq.

Injunctive relief
- burning, open p. 4-4
- claim for money, combined with p. A-III-6
- emergency, air pollution p. 5-1 et seq.
- federal activities p. A-III-13
- nuisance, public pp. A-III-21, A-III-36

Legal complaint p. A-III-1

Shut down of operations pp. 4-4, 5-1

Temporary restraining order p. 5-1 et seq.

CHAPTER VII

SUMMARY OF RECOMMENDATIONS

Alabama has a good air pollution control statute which can be expected to serve the people of the state as a viable tool for environmental control.

In our opinion the Alabama Air Pollution Control Act of 1971 could be strengthened by amending section 15 to permit a municipal reference ordinance system. Reference ordinances would allow city police to issue citations to violators even though the city had no local air pollution control program. The number of enforcement personnel in the state's air pollution control effort would be increased without the necessity of establishing another administrative level. (p. 2-8)

A number of measures could be taken by the Alabama Air Pollution Control Commission to improve its procedures. Such internal housekeeping works to insure administrative due process. Rules of Practice governing the conduct of hearings and filing of papers should be adopted for the reliance of parties and their representatives. (p. 1-13) The specific details of these rules are not important so long as they are definite, readily available in published form, and followed. In its dealing with parties it is important that the Commission avoid the appearance of arbitrariness; to this end formal Rules of Practice are helpful. Formalized guidelines for Commission personnel concerning such matters as entry on private property without an administrative search warrant (p. 3-8) and treatment of confidential records serve the same purpose (p. 3-14). The Commission can increase the efficiency of the Division of Air Pollution Control by delegating to the Director the authority to issue citations pursuant to section 17(e) of the Act (p. 1-4).

However, the main problem with implementation and enforcement of the Act lies beyond the authority of the Commission and the best efforts of the Division's staff. Attorneys for the Commission face difficulties with Alabama procedure markedly different from those faced by environmental litigants in other states. (pp. 3-1 et seq.) Representatives of the Commission should join with other Alabama attorneys in the movement for law reform by urging the adoption of a procedural code basically similar to the Federal Rules of Civil Procedure so as to avoid the stringencies of common law pleading. The complexities of environmental litigation should not be made more difficult by use of a procedural system which splits legal and equitable relief, which demands strict pleading of evidentiary facts, and which codifies ancient practices to the confusion of the modern practitioner. Attached hereto is a copy of a letter from the Project Director to the Chairman of the Alabama Air Pollution Control Commission recommending that Commission and the Commission's legal representative, the Attorney General of Alabama join in urging the Justices of the Alabama Supreme Court to promulgate a new set of rules similar to the Federal Rules of Civil Procedure.

The University of Alabama
School of Law
Box 1435
University, Alabama 35486

September 15, 1972

Dr. Ira L. Meyers
Chairman
Alabama Air Pollution Control Commission
State Health Office
State Office Building
Montgomery, Alabama 36104

Dear Dr. Meyers:

During the summer months of 1972 law students at the University of Alabama School of Law have been engaged in research concerning implementation and enforcement of the Alabama Air Pollution Control Act of 1971. This research was carried out under my direction pursuant to a contract with the Environmental Protection Agency. We had the opportunity to discuss implementation and enforcement procedures both with personnel of the Department of Public Health, the Attorney General's Department, and members of the Commission, and are grateful for their assistance and encouragement.

We think that enforcement of air pollution control in Alabama courts will be difficult under the present system of Alabama common law pleading. This is because environmental litigation with its reliance on complex scientific and technical proof is made even more difficult under the Alabama system with its strict pleading rules than it is in courts of other American jurisdictions which follow procedural systems similar to the Federal Rules of Civil Procedure.

At the present time, efforts by the Alabama Supreme Court are under way to draft a new system of procedure for Alabama which will be basically similar to the Federal Rules. We believe that it is in the interest of the Air Pollution Control Commission and representatives of the Attorney General's Environmental Enforcement Division that this be done. The complexities of environmental litigation should not be made more difficult by use of a procedural system, such as that in use in Alabama at the present time, which splits legal and equitable relief, which demands strict pleading of evidentary facts, and which codifies ancient practices to the confusion of the modern practitioner.

We think that it would aid the movement toward the Federal Rules if you, as Chairman of the Commission, would address the Attorney General and ask him to join you in writing the Chief Justice of the Alabama Supreme Court and reporting to him the need for new procedural rules similar to the Federal Rules of Civil Procedure which will allow notice pleading and liberal proof of scientific and technical matters. Such a letter should point out that the Commission and the Attorney General are entrusted with the enforcement of laws to protect the public health. The research which we have done leads us to believe that enforcement will be carried out more effectively under the proposed set of Alabama rules, similar to the Federal Rules of Civil Procedure, than under the ancient system.

We have enjoyed working with members of the Division of Air Pollution Control during the summer and if there is any way we can be of help to the Commission we would like to do so.

Very truly yours,

Bill Futrell

J. William Futrell
Associate Professor of Law

JWF/bbw

JEFFERSON COUNTY DEPARTMENT OF HEALTH

BUREAU OF ENVIRONMENTAL HEALTH

OFFICIAL NOTICE

№ 70715 Date ______________________ 19____

Name ____

Location ____

Nature of Business ____________________________________

You are hereby notified to comply with the following requirements within __________ days:

____

____

____

____

____

____

____

____

____

Failure to comply with this notice will necessitate prosecution as provided by law.

____
Sanitarian.

TO BE GIVEN TO OWNER OR MANAGER

JEFFERSON COUNTY DEPARTMENT OF HEALTH
AIR POLLUTION CONTROL PROGRAM
AND
ALABAMA AIR POLLUTION CONTROL COMMISSION

Page ___ of ___

Date__________

Name of Company______________________________

Permit Number(s):

Permit Conditions

In addition to compliance with the Act (Act Number 769, Alabama Legislature, Regular Session, 1971) and with all applicable Air Pollution Control Rules and Regulations, the following conditions are hereby contained in and made a part of the requirements of this Permit:

1. This Permit is issued based on the provisions contained in all existing Air Pollution Control Rules and Regulations. In the event additional amendments, revisions or additions are added to these Rules and Regulations, it will be the responsibility of the permit holder to comply with such new Rules and Regulations.

Page 1 of

JEFFERSON COUNTY DEPARTMENT OF HEALTH
AIR POLLUTION CONTROL PROGRAM
and
ALABAMA AIR POLLUTION CONTROL COMMISSION

TEMPORARY PERMIT TO OPERATE AIR CONTAMINANT SOURCE(S)

Date Issued

Date Expires

Name of Company

Address

Permit Number(s)

Description of Source(s)

This permit is issued pursuant to the provisions of Chapter 2 of the Jefferson County Air Pollution Control Rules and Regulations, Part 1.12 of the Alabama Air Pollution Control Commission's Rules and Regulations and Section 18 of Alabama Act 769, Regular Session 1971.

This permit is issued subject to the accuracy of all information submitted relating to the permit application and to any conditions noted on the attached pages and is not transferable. It is valid from the date of issue and must be posted or kept on file at the facility for which issued.

PAUL PATE, DIRECTOR
BUREAU OF ENVIRONMENTAL HEALTH

W. T. WILLIS, DIRECTOR
ALABAMA AIR POLLUTION CONTROL COMMISSION

1917

APPROVED:
George E. Hardy, Jr., M.D., Health Officer

Page 1 of ________

JEFFERSON COUNTY DEPARTMENT OF HEALTH
AIR POLLUTION CONTROL PROGRAM
and
ALABAMA AIR POLLUTION CONTROL COMMISSION

CONDITIONAL PERMIT TO OPERATE AIR CONTAMINANT SOURCE(S)

Date Issued ________

Date Expires ________

Name of Company ________

Address ________

____

Permit Number(s)	**Description of Source(s)**

This permit is issued pursuant to the provisions of Chapter 2 of the Jefferson County Air Pollution Control Rules and Regulations, Part 1.12 of the Alabama Air Pollution Control Commission's Rules and Regulations and Section 18 of Alabama Act 769, Regular Session 1971.

This permit is issued subject to the accuracy of all information submitted relating to the permit application and to any conditions noted on the attached pages and is not transferable. It is valid from the date of issue and must be posted or kept on file at the facility for which issued.

This permit may be revoked at any time if satisfactory progress toward compliance is not achieved.

____

PAUL PATE, DIRECTOR
BUREAU OF ENVIRONMENTAL HEALTH

____

W. T. WILLIS, DIRECTOR
ALABAMA AIR POLLUTION CONTROL COMMISSION

1917

APPROVED:
George E. Hardy, Jr., M.D., Health Officer

Page 1 of ____________

JEFFERSON COUNTY DEPARTMENT OF HEALTH
AIR POLLUTION CONTROL PROGRAM
and
ALABAMA AIR POLLUTION CONTROL COMMISSION

PERMIT TO CONSTRUCT AIR POLLUTION SOURCE (S)

Date Issued ________________

Name of Company ____

Address ____

____

Permit Number(s)　　　　Description of Source(s)

This permit is issued pursuant to the provisions of Chapter 2 of the Jefferson County Air Pollution Control Rules and Regulations, Part 1.12 of the Alabama Air Pollution Control Commission's Rules and Regulations and Section 18 of Alabama Act 769, Regular Session 1971.

This permit is issued subject to the accuracy of all information submitted relating to the permit applications and to any conditions noted on the attached pages and is not transferable. It is valid from the date of issue and must be posted or kept on file at the facility for which issued.

This source may not be operated until a permit to do so has been obtained from this office.

____
PAUL PATE, DIRECTOR
BUREAU OF ENVIRONMENTAL HEALTH

____
W. T. WILLIS, DIRECTOR
ALABAMA AIR POLLUTION CONTROL COMMISSION

1917

APPROVED:
George E. Hardy, Jr., M.D., Health Officer

Page 1 of ______________

JEFFERSON COUNTY DEPARTMENT OF HEALTH
AIR POLLUTION CONTROL PROGRAM

PERMIT TO OPERATE AIR CONTAMINANT SOURCE (S)

Date Issued ______________

Name of Company ______________________________

Address ______________________________

____

Permit Number(s)

Description of Source(s)

This permit is issued pursuant to the provisions of Chapter 2 of the Jefferson County Air Pollution Control Rules and Regulations,

This permit is issued subject to the accuracy of all information submitted relating to the permit application and to any conditions noted on the attached pages and is not transferable. It is valid from the date of issue and must be posted or kept on file at the facility for which issued.

This permit may be revoked at any time when a violation of the Jefferson County Air Pollution Control Rules and Regulations

____

PAUL PATE, DIRECTOR
BUREAU OF ENVIRONMENTAL HEALTH

____

1917

APPROVED:
George E. Hardy, Jr., M.D., Health Officer

JEFFERSON COUNTY DEPARTMENT OF HEALTH

PERMIT APPLICATION FOR CONSTRUCTION OR OPERATION OF AN INCINERATOR

Incinerator Permit Number ☐☐☐☐☐☐☐ ☐☐☐

1. Information regarding purchaser or owner of incinerator:

   a. Name of organization: ____________________

   b. Address: ____________________
   Street City State Zip

   c. Person to contact regarding this application: ____________________
   Name

   ____
   Title Phone

2. Information regarding manfacturer's sales representative:

   a. Name of local representative: ____________________
   Name of Company

   b. Person to contact regarding this application: ____________________
   Name

   ____
   Title Phone

   c. Incinerator trade name and model number: ____________________

3. Permit application is made for:

   a. _____ Construction

   b. _____ Modification

   c. _____ Operation

4. Incinerator design data:

   a. Rated capacity __________ lbs/hr

   b. Stack data:

      height above grade _________ feet

      inside diameter __________ inches

   c. _____ Single chamber

      _____ Multiple chamber

d. _____ **Primary burner** __________ **BTU/hr.**
rating

Fuel:

_____ **Natural gas**

_____ **Other (specify)** ______________________________

e. Gas cleaning equipment:

_____ **Wet scrubber** **water flow rate** __________ **gal/hr.**

_____ **After burner** __________ **BTU/hr.**
rating

Fuel:

______ **Natural gas**

______ **Other (specify)** ______________________________

_____ **Precipitator**

_____ **Other (specify)** ______________________________

5. Information regarding specific installation:

a. Address of installation: ______________________________
Street

____
City **State** **Zip Code**

b. Person to contact at installation site: ______________________________
Name

____
Title **Phone**

c. Date incinerator was installed or is to be installed __________

d. Type of material to be burned: (Use I.I.A. classification for type of waste)

Circle all applicable: Type 0, 1, 2, 3, 4, 5, 6, other __________

Briefly describe origin of waste to be burned: ______________________________

____

____

e. Schedule of operation:

Day	Hours per day	Days per year
Sun.		
Mon.		
Tues.		
Wed.		
Thurs.		
Fri.		
Sat.		

Total hours per year:_______________

6. **Is this incinerator in compliance with all applicable Air Pollution Control Rules and Regulations:**

____ Yes ____ No

(If "No", a compliance schedule Form APC 105 must be submitted)

7. **Stack test data:** (required if incinerator is said to be in compliance)

a. ____ Stack test results included with application

____ Stack test results on file with Jefferson County Air Pollution Control Program for similar model numbers _______________________
(Specify model numbers)

b. **Results of stack test**

Particulate emission ________ pounds per hundred pounds of **refuse charged.**

________ minutes the visible emissions from the incinerator **were greater than** 60 percent opacity in a one hour period.

________ minutes the visible emissions from the incinerator **were greater than** 20 percent opacity in a one hour period.

Note: Specifications and requirements for the stack test can be obtained from the Jefferson County Air Pollution Control Program.

8. **A detailed drawing of the incinerator** and a copy of the operating **instructions for this incinerator** must accompany this application.

9. **I certify that the information submitted on this form is true and accurate to the best of my knowledge and furthermore agree to operate the incinerator only between the hours of noon and 4 p.m. when the alert stage of an Air Pollution Episode is declared and to cease all operations of the incinerator immediately when either the warning or emergency stage of an Air Pollution Episode is declared.**

_______________________________ Signature of owner or manager

_______________________ Date

Jefferson County Department of Health
Air Pollution Control Program
1912 - 8th Avenue South
P. O. Box 2646
Birmingham, Alabama 35202
Phone: 324-9571 - Ext. 327

JCAPC Form S-ol Revised 7-72

QUARTERLY PROGRESS REPORT

Jefferson County Air Pollution Control Program

1st Quarter - 1972

FOR SUBMISSION TO ALABAMA AIR POLLUTION CONTROL COMMISSION

AT REGULAR MEETING ON MAY 24, 1972

On January 7 and 8, 1972, the Jefferson County Board of Health held Public Hearings on their proposed Air Pollution Control Rules and Regulations. As a result of these hearings, modifications were made in the proposed code and on January 28, 1972, the Jefferson County Board of Health Air Pollution Control Rules and Regulations were officially adopted. This action signalled a new era for the Health Department. After many years of seemingly fruitless effort, the Jefferson County Health Department's Air Pollution Control Program began officially functioning as a control agency.

These Rules and Regulations assured the Health Department the use of the $120,474 federal grant approved by the Environmental Protection Agency on January 11, 1972.

To implement the permit system established by the Rules and Regulations, this office and members of the Alabama Air Pollution Control Commission's Technical Staff developed the necessary permit application forms. At this time six forms have been developed and provide the information necessary to permit the sources.

More than 85 Jefferson County industrial sources were mailed copies of these forms on March 9 and 10 and required to apply for permits. Due to the high potential for an air pollution episode in Jefferson County, the Air Pollution Episode Plan form was required to be returned in 30 days. The remainder of the forms were required by June 30.

By the end of the quarter some sources had indicated their intention to comply. Swift Agricultural Chemical Corporation returned its completed permit application form well in advance of the deadline and will probably receive the first permit to construct to be issued in Jefferson County under the new law. The permit will cover the installation of a venturi-type wet scrubber for control of particulate emissions from the company's ammoniator granulator system. The permit application states Swift's intent to be in full compliance with the law by July 5, 1972.

An unofficial preliminary compliance schedule has been submitted by Lone Star Industries, Inc., covering its operations in Jefferson County. The company's formal permit application has not yet been received. The preliminary declaration, however, state the company's intention to stay in Birmingham and to bring its operations into compliance with local Air Pollution Regulations.

Early in March, Ben F. Harrison, President, of U. S. Pipe and Foundry Company, signed an authorization for a $2 million expenditure to bring its

North Birmingham Pipe Plant into compliance. Formal permit applications for this and other U. S. Pipe operations in Jefferson County are still under preparation.

In addition to regulating large stationary sources, a system for requiring written authorization for all open burning within the County was also developed and implemented, and permitting of all new incinerator installations was begun.

Much time was devoted to recruiting and training of new staff members. At the end of the first quarter the Jefferson County Air Pollution Control Program had two engineers, two sanitarians, an intermediate stenographer, a chemist, a technician, a public information specialist, and a lab technician which totals nine full time employees. One sanitarian position and a statistician position were the only positions still vacant at the end of the quarter.

One of the major endeavors of the program during the first quarter was informing the public and the sources of the requirements of the newly adopted Air Pollution Control Rules and Regulations and how this program would operate.

The main project used to inform the public was a five part series of articles that was published on the front page of the Birmingham News beginning on February 28, 1972. These articles identified the requirements of the Rules and Regulations as they apply to every source. In addition to these articles, 20 talks were given to approximately 600 persons and various public information material was developed to answer requests for information.

The effectiveness of the public information program can probably best be measured by noting the number of complaints received. There were 6 complaints received in January, 16 complaints received in February and 54 complaints received in March for a total of 76. Of these 76, 52 required investigation and 26 could be corrected. The majority of these complaints corrected were open fires.

Various form letters were sent to mayor's, hospitals, fire chief, schools, incinerator manufactures, and supermarket chains in an effort to inform these people of the requirements of the sections of the Rules and Regulations most applicable to them. A form letter with the same purpose was also delivered by sanitarians in the food program to all food establishments as normal inspections were made.

Another major endeavor during the first quarter was beginning work on the expanded air sampling network. A high-volume sampler was put into operation in Fairfield and a trailer to house the continuous monitoring equipment was set up at the North Birmingham sampling station. Much time was spent in repairing, cleaning and purchasing equipment and supplies that will be necessary to expand the sampling network.

Mean and maximum particulate levels recorded at all stations for the first three months of this year are attached on Figure 2.

Generally, the major accomplishments of the Jefferson County Air Pollution Control Program for the first quarter of 1972 were:

1. Passage of the Jefferson County Air Pollution Control Rules and Regulations.
2. Development of forms and mailing of permit applications.
3. Assisting sources in completion of these permit applications.
4. Establishment of an effective complaint handling system.
5. Publicizing the Rules and Regulations.
6. Obtaining and training staff members.
7. Expansion of the air quality monitoring program.
8. Intiating a system for controlling open fires.
9. Development of the necessary forms and procedures for permitting new incinerators.

FIGURE 1
QUARTERLY REPORT SUMMARY
1st QUARTER 1972

1.	Requests for Information	79
2.	Complaints Received	76
3.	Talks Given	20
	a. Number in Attendance	594
4.	News Articles Released	8
5.	Technical Articles Released	0
6.	Meetings Attended and/or Conducted	15
7.	Sampling Station Visits	484
8.	Samples Collected	443
9.	NASN Samples Collected	6
10.	Complaints Investigated	52
11.	Complaints or Nuisances Corrected	26
12.	Plants Tours, Inspections, etc	4
13.	Block or Area Surveys	0
14.	Promotional Visits	0
15.	Office Visits	22
Total Inspections - Air Pollution		56

AIR QUALITY DATA SUMMARY - JEFFERSON COUNTY, ALABAMA

Sampling Period January 1, 1972-March 31, 1972

Pollutant	SAMPLING SITE LOCATION			Sampling Interval (Months)	Start Date	End Date	No. of Samples	Units	Max. 1 hour	Max. 8 hours	Max. 24 hours	Arith. Mean	Geo. Mean	G S D
	City	UTM-Coor.	Sarod No.											
articulates	Downtown	5173-37077	0340-001	3	1-1-72	3-31-72	83	μg/m^3	-	-	404	-	138	1.
	No.B'ham	5172-37124	0380-011	3	1-1-72	3-31-72	60	μg/m^3	-	-	501	-	170	1.
	Fairfield	5079-37049	1300-002	3	1-1-72	3-31-72	16	μg/m^3	-	-	254	-	133	1.
	Woodlawn	5223-37107	0380-005	3	1-1-72	3-31-72	52	μg/m^3	-	-	237	-	121	1.
	Tarrant	5215-37159	3200-001	3	1-1-72	3-31-72	58	μg/m^3	-	-	319	-	115	1.
	West End	5136-37055	0380-011	3	1-1-72	3-31-72	48	μg/m^3	-	-	275	-	101	1.
	Bessemer	5044-36955	0340-001	3	1-1-72	3-31-72	61	μg/m^3	-	-	337	-	106	1.
	Mt. Brook	5241-37030	2540-001	3	1-1-72	3-31-72	47	μg/m^3	-	-	112	-	53	1.

Statutory fine

WATER IMPROVEMENT COMMISSION, A COMMISSION OF THE STATE OF ALABAMA; STATE OF ALABAMA, EX REL WILLIAM J. BAXLEY, ATTORNEY GENERAL OF THE STATE OF ALABAMA, PLAINTIFF	IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA, AT LAW CASE NO. ________
VS.	
MANN BROS. METAL PLATING, INC., A CORPORATION, AND X, XY, AND XYZ, BEING THOSE PERSONS, PARTNERSHIPS OR CORPORATIONS WHO ARE RESPONSIBLE FORTHE DAMAGES TO THE PLAINTIFF AS A RESULT OF ITS NEGLIGENCE WHICH WAS DISCOVERED ON TO-WIT SEPTEMBER 4, 1970, TRUE NAMES AND IDENTITIES ARE OTHERWISE UNKNOWN BUT WILL BE ADDED BY AMENDMENT WHEN ASCERTAINED, DEFENDANT	

COMPLAINT

COUNT ONE

The Plaintiff claims of the Defendant Ten thousand and No/100 Dollars ($10,000.00) for that heretofore on to-wit, September 4, 1970, and at the present time, said Plaintiff is the duly qualified agency of the State of Alabama created pursuant to Title 22, Section 140(8) Code of Alabama 1940, as amended, known as the Water Improvement Commission; that said Plaintiff is the proper agency for the State of Alabama for the protection, improvement and conservation of the ground and surface waters of the State of Alabama;

That on to-wit, September 4, 1970. and prior times thereto, the Defendant was engaged in the operation of a metal plating business located along the Cahaba River at or near the town of Trussville, Jefferson County, State of Alabama; that as a part of its metal plating operation, said Defendant applied, administered or sprayed toxic chemical compounds, including cyanide and copper sulphate solutions in its operations; that the Defendant had a duty to obey said rule of the Plaintiff pursuant to Title 22, Section 140(9) Code of Alabama 1940, as amended; that in said metal plating operation said Defendant negligently allowed, permitted or caused toxic waste material to be discharged into the waters of said Cahaba River, and the tributaries that flow into said Cahaba River, a river whose waters are wholly or partially within the State of Alabama; that the negligence of said Defendant in allowing, permitting, or causing the discharge of said toxic waste materials into said river and tributaries was discovered by the Plaintiff on to-wit, September 4, 1970; that Defendant's said negligence caused the following damage, to-wit: thousands of pounds of fish life and other wildlife were killed or destroyed; the balance of nature of the river and tributaries was damaged and destroyed; the future growth of the wildlife, aquatic life, and plant life was damaged, injured, impaired and retarded; the people of the State of Alabama were deprived of the use and benefits of said river for an indefinite period of time and will be continually deprived of the use and benefits of said river in the future; that the loss of fish and wildlife and the public notice of said loss caused economic hardship to the people of the State of Alabama; wherefore the Plaintiff was damaged as aforesaid;

Plaintiff avers that the aforesaid damages were the proximate result of the negligence of the Defendant in that said Defendant negligently allowed, negligently permitted, or negligently caused toxic waste materials to be discharged into said waters of the State of Alabama as aforesaid; Plaintiff further avers that it has directed the Attorney General of the State of Alabama to file suit for damages against the Defendant pursuant to Title 22, Section 140(9)(q) Code of Alabama 1940 as amended.

COUNT TWO

The Plaintiff claims of the Defendant ten thousand and No/100 Dollars ($10,000.00) for that heretofore on to-wit, September 4, 1970, and at the present time, said Plaintiff is the duly qualified agency of the State of Alabama created pursuant to Title 22, Section 140(8) Code of Alabama 1940, as amended, known as the Water Improvement Commission; that said Plaintiff is the proper agency for the State of Alabama for the protection, improvement and conservation of the ground and surface waters of the State of Alabama;

That on to-wit, September 4, 1970 and prior times thereto, the Defendant was engaged in the operation of a metal plating business located along the Cahaba River at or near the town of Trussville, Jefferson County, State of Alabama; that as a part of its metal plating operation, said Defendant applied, administered or sprayed toxic chemical compounds, including cyanide and copper sulphate solutions in its operations; that the Defendant had a duty to obey said rule of the Plaintiff pursuant to Title 22, Section 140(9) Code of Alabama 1940, as amended; that in said metal plating operation said Defendant willfully allowed, permitted or caused toxic waste material to be discharged into the waters of said Cahaba River, a river whose waters are wholly or partially within the State of Alabama; that the willfulness of said Defendant in allowing, permitting, or causing the discharge of said toxic waste materials into said waters was discovered by the Plaintiff on to-wit, September 4, 1970; that Defendant's said willfulness caused the following damage, to-wit: thousands of pounds of fish life and other wildlife were killed or destroyed; the balance of nature of the river was damaged and destroyed; the future growth of the wildlife, aquatic life, and plant life was damaged, injured, impaired and retarded; the people of the State of Alabama were deprived of the use and benefits of said river for an indefinite period of time and will be continually deprived of the use and benefits of said river in the future; that the loss of fish and wildlife and the public notice of said loss caused economic hardship to the people of the State of Alabama; wherefore the Plaintiff was damaged as aforesaid;

Plaintiff avers that the Defendant willfully injured the Plaintiff in that said Defendant willfully allowed, willfully permitted, or willfully caused said toxic waste materials to be discharged into said waters, which said willfullness proximately caused the damage to Plaintiff as aforesaid; Plaintiff further avers that it has directed the Attorney General of the State of Alabama to file suit for damages against the Defendant pursuant to Title 22, Section 140(9)(q) Code of Alabama 1940 as amended.

WATER IMPROVEMENT COMMISSION

By
WILLIAM J. BAXLEY
ATTORNEY GENERAL

GEORGE L. BECK, JR.
DEPUTY ATTORNEY GENERAL

DON C. DICKERT
ASSISTANT ATTORNEY GENERAL

J. VICTOR PRICE, JR.
ASSISTANT ATTORNEY GENERAL

Plaintiff demands trial by struck jury

GEORGE L. BECK, JR.
DEPUTY ATTORNEY GENERAL

THE STATE OF ALABAMA,
EX REL WILLIAM J.
BAXLEY, ATTORNEY GENERAL,

COMPLAINANT

VS.

JERE BEASLEY, INDIVIDUALLY AND AS ACTING GOVERNOR OF THE STATE OF ALABAMA; W. T. THRASH; JOHN C. MCKINNEY; FARMERS' MARKET AUTHORITY OF THE STATE OF ALABAMA; WALTER C. GIVHAN, INDIVIDUALLY AND AS CHAIRMAN OF FARMERS' MARKET AUTHORITY OF THE STATE OF ALABAMA; AND WILLIAM M. ARRINGTON, INDIVIDUALLY AND AS ADMINISTRATOR OF FARMERS' MARKET AUTHORITY OF ALABAMA,

RESPONDENTS

IN THE CIRCUIT COURT
OF
CHILTON COUNTY,
STATE OF ALABAMA
IN EQUITY
CASE NO.____________

BILL OF COMPLAINT

To the Honorable Judge in Equity, sitting:

Comes now your complainant State of Alabama by and through William J. Baxley, Attorney General, and represents and shows unto the court the following facts and averments upon which it hereinafter prays for relief:

1. That your complainant is the State of Alabama, and that this action is brought on the relation of William J. Baxley, who is the duly elected and qualified Attorney General, and who

brings this action pursuant to Title 55, Section 229 Code of Alabama 1940, as amended.

2. The respondent Jere Beasley is sued individually and as Acting Governor of the State of Alabama, and resides in Montgomery County, Alabama.

The respondents W. T. Thrash and John C. McKinney reside in Chilton County, Alabama.

That the respondent Farmers' Market Authority of the State of Alabama, hereinafter referred to as the "Authority," is organized pursuant to Title 23 Section 691 et seq Code of Alabama 1940, as amended, with its principal place of business in Montgomery County, State of Alabama; that the respondent Walter C. Givhan is sued individually and as Chairman of said Authority and resides in Dallas County, Alabama; that the respondent William M. Arrington is sued individually and in his capacity as Administrator of said Authority and resides in Montgomery County, Alabama.

3. That proper venue of this action lies in Chilton County, State of Alabama pursuant to Title 7 Section 294 Code of Alabama 1940, as amended, in that two material defendants reside in Chilton County, Alabama, and that the real estate made the subject of said action lies in Chilton County, Alabama.

4. That on to-wit June 16, 1972 the respondent Authority

held a meeting in Chilton County, Alabama in which the respondents Thrash and McKinney suggested the need for a market site in Chilton County, and that pursuant to said meeting and other conversations among the respondents, which are otherwise unknown to the complainant, all of said respondents entered into and executed a lease from the respondents Thrash and McKinney to the respondent Authority on to-wit June 29, 1972, of the following described real estate, lying, being and situated in Chilton County, State of Alabama, viz:

> Begin at a point where the South margin of Guy Street intersects the West right-of-way of the L & N railroad property, and from said point run South 67 degrees 04 minutes West a distance of 417.4 feet to a point, thence run South 21 degrees 04 minutes East 600 feet to a point, thence run North 67 degrees 04 minutes East 417.4 feet to a point on the west right-of-way line of the L & N railroad property, thence run North 21 degrees 04 minutes West 600 feet back to the point of beginning.
>
> Said property lying and being in the NE 1/4 of Section 26, Township 23, Range 13, Chilton County, Alabama.

A copy of said lease agreement is marked Exhibit A and is attached to this bill of complaint and incorporated by reference as is fully set-out herein:

5. Complainant alleges that the lease marked Exhibit A was procured and executed for grossly inadequate consideration to the extent that it operates as a fraud on the farmers and

taxpayers of the State of Alabama; that the consideration provided for in said lease is grossly inadequate; that said action of leasing the agricultural marketing site, hereinafter referred to as the "site," constitutes gross abuse of discretion on the part of the respondents Beasley, Givhan and Arrington; and a breach of public trust by said respondents; and that said conduct operated, and continues to operate, against the public interest;

6. Complainant alleges that said fraud and abuse of discretion consists of the following:

that paragraph one (1) of the lease marked Exhibit A requires the Authority to pay as rent the sum of Six thousand five hundred ($6,500) Dollars per year for a period of twenty (20) years for a total rental of One hundred thirty thousand ($130,000) Dollars which must be paid in advance upon execution of said lease; that upon execution of said lease said entire amount of $130,000 was paid to Respondents Thrash and McKinney by respondent Authority; as evidence of said payment a copy of the voucher is marked Exhibit B and attached to this bill of complaint and specifically incorporated by reference; That on the date of said lease all of said respondents knew, or should have known upon reasonable diligence, of the true rental and market value of said site; that prior to the execution of said lease a warranty deed conveying the site was executed by J & M Supply Company, Inc. to the respondents Thrash and McKinney which was filed for record on to-wit, June 22, 1972, in the office of the Judge of Probate of Chilton County, Alabama in deed book 585 page 454; copy of said deed is marked Exhibit C and attached to this bill of complaint and specifically incorporated by reference as if fully set out herein; That the consideration of said conveyance was recited as being fifty-five thousand ($55,000) Dollars, and complainant alleges that the actual market and rental value of said site is substantially less than the $130,000 consideration paid by respondent Authority for the mere privilege of renting said site; That the consideration paid by the Authority was more than enough to purchase two such sites in fee simple, and the consideration given by the respondents Thrash and McKinney for mere rental purposes is so grossly inadequate as to shock the conscience of all reasonable men;

That the excessive advance payment made in return for the grossly inadequate consideration creates a presumption of collusion and fraud on the part of all respondents; that said conduct by said respondents contradicts the express purpose of the creation of the Authority which is to prevent waste;

7. That the existence and operation of said lease causes irreparable injury to the farmers, consumers and taxpayers of

the State of Alabama.

PREMISES CONSIDERED, your complainant prays that your honor will take jurisdiction of this matter and cause proper process to issue against the respondents, requiring them to demur, answer or plead within the time required by law, and after hearing the evidence presented, will enter the following relief:

a. Issue a temporary restraining order to maintain the status quo and enjoin and restrain respondent Authority from subletting, subleasing or otherwise executing said lease.

b. Enter a decree rescinding said lease marked Exhibit A and holding it null and void.

c. Enter a decree against each and every respondent awarding the complainant the return of the consideration paid by the respondent Authority to the respondents W. T. Thrash and John C. McKinney in the amount of $130,000 plus interest at the rate of 6 percent per annum.

d. Complainant prays for such other, further and different relief to which it may be entitled.

Complainant offers to do equity.

Respectfully submitted,

WILLIAM J. BAXLEY
ATTORNEY GENERAL

GEORGE BECK
DEPUTY ATTORNEY GENERAL

Sworn to and subscribed before me this the 19th day of July, 1972.

GEORGE BECK

Mary T. Johnson
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA,
MOBILE DIVISION

STATE OF ALABAMA, EX REL. WILLIAM J. BAXLEY, ATTORNEY GENERAL, PLAINTIFF, VS. CORPS OF ENGINEERS OF THE UNITED STATES ARMY, STANLEY R. RESOR, SECRETARY OF THE ARMY, AND GENERAL FREDERICK B. CLARKE, CHIEF OF ENGINEERS, CORP OF ENGINEERS OF THE UNITED STATES ARMY, AND COLONEL H. A. GRIFFITH, DISTRICT ENGINEER, MOBILE DISTRICT, U.S. ARMY CORP OF ENGINEERS AND RADCLIFF MATERIALS CORPORATION, INC., DEFENDANT.	MOBILE COUNTY, ALABAMA CASE NO.____________

COMPLAINT

JURISDICTION AND DESCRIPTION OF THE PARTIES

1. Plaintiff State of Alabama brings this action by its Attorney General, William J. Baxley, pursuant to the provisions of Title 55, Section 229, Code of Alabama 1940, which authorizes the attorney general to institute and prosecute in

the name of the state all suits and other proceedings at law or in equity necessary to protect the rights and interests of the state.

2. Defendant Corps of Engineers is an agency of the United States and a branch of the United States Army, 10 U S.C. Section 1063. It is charged by statute with the accomplishment of certain civil functions of the Department of the Army, such as the granting of dredging permits in navigable waters. Defendant, Stanley R. Resor, is Secretary of the Army of the United States and is an officer of the United States. Defendant General Frederick B. Clarke, is Chief of Engineers, Corps of Engineers and is an officer of the United States. The authority of these defendants to carry out their civil functions, however, is limited by statutes and other laws; accordingly, the defendants must comply with these statutes and laws with respect to the project in question. The individual defendants and their predecessors in office have been and continue to be responsible for the illegal, unauthorized, and ultra vires actions hereinafter alleged. Relief is sought against them to enjoin them from further illegal, unauthorized, and ultra vires actions and they are therefore joined as defendants in their official capacities.

3. Defendant Radcliff Material, Inc., an Alabama Corporation with its principal office at McDuffie Island, Mobile, Alabama, is the holder of a permit from the Mobile District of the Corps of Engineers granted 14 December 1971 to perform commercial dredging of dead reef shell in certain areas of Mobile Bay. A copy of the

aforesaid permit is attached hereto as Exhibit "A". The conditions attached to the said permit state that, "dredging shall not be done closer than one mile from any shore line or at a distance from an oyster reef or oyster bottom lease closer than that determined as safe for the protection of oyster reefs or live oysters by the Marine Resources Division.

4. This Court has jurisdiction over this suit under 42 U.S.C. #4231 et. seq. (The National Environmental Policy Act of 1969); 33 U.S.C. #403 (the laws relating to the establishment, management and regulation of dredging permits); 5 U.S.C. #702 (review of agency action); 28 U.S.C. #1331 (a) (federal question); and 28 U.S.C. #2201 et. seq. (declaratory judgments). The amount in controversy, exclusive of interest and costs, exceeds $10,000.

5. This suit arises out of the grant to Radcliff Materials, Inc. of a permit for commercial dredging of dead reef shell in Mobile Bay, signed by defendant Colonel Griffith of the Mobile District Corps of Engineers, without the filing of an Environmental Impact Statement as required by the National Environmental Policy Act 42 U.S.C. #4321 et. seq. The proximity of the area covered by the permit constitutes one of the richest esuarine resources of the United States. The well being of Alabama's oyster, shrimp and fishing industry, as well as the region's recreational and conservational activities centering on fish and water life is dependent on the ecological health of Mobile Bay. The ecology of the area and the food supply available to its fish and wildlife have long been maintained in delicate balance by natural forces.

6. Defendant Radcliff Materials, Inc. is engaged in extensive dredging operations placing sediment in suspension, removing reef shell and in general altering the ecology of Mobile Bay in such a way as to harm the fish and wildlife which are a public resource.

7. Defendant Radcliff Materials, Inc. has dredged on and around oyster reefs resulting in the destruction of live oysters. These activities threaten the survival of the oyster reefs and the continuing ecological health of Mobile Bay.

8. The issuance of the said permit, signed by defendant Colonel Griffith of the Mobile District Corps of Engineers, by the District Chief is a major Federal action significantly affecting the quality of the human environment within the meaning of #102(c) of the National Environmental Policy Act.

9. The permit, a copy of which is attached hereto as Exhibit "A" was issued in violation of the National Environmental Policy Act which states that an Environmental Impact Statement must be filed prior to any major federal action significantly affecting the quality of the human environment. Numerous citizens groups in the Mobile area have called upon the Mobile District Corps of Engineers to file such an Environmental Impact Statement and defendant Colonel Griffith of the Mobile District has stated that such an Environmental Impact Statement should be filed on this project. Nevertheless, the permit was granted prior to the filing of an Environmental Impact Statement. Such a course of action is contrary to the dictate of the National Environmental Policy Act and the

permit is therefore invalid.

10. The aforesaid dredging activities are illegal since they are conducted without the possession of a valid permit from the Corps of Engineers by Radcliff Materials, Inc.

11. Plaintiffs aver on information and belief that the aforesaid permit and procedure are also illegal because the Corps of Engineers is not conducting research concerning the environmental impact of the activities of its permitee, Radcliff Materials, Inc. but has instead delegated such research work to its permitee, a private commercial party with an interest in the result of the research.

12. Plaintiff is informed that further applications will be made for permits to continue dredging reef shell in Mobile Bay.

13. Mobile Bay is, in its natural state, part of the public trust of the United States, which all citizens of Alabama have a right to use and enjoy free from any governmental or commercial distrubance not preceded by a reasonably careful full and impartial investigation and assessment of known possible environmental effects.

14. The aforesaid right is secured to the people of Alabama by a body of decisional law known as the public trust doctrine. This Doctrine is part of the federal common law and is one of the national policies underlying the National Environmental Policy Act.

15. Defendants in proceeding without a valid permit are in violation of the law.

16. Defendants will persist, unless restrained by this Court, in their unlawful activities, in violation of the National

Environmental Policy Act and that portion of the common law of the United States known as the public trust doctrine.

17. Plaintiff has no adequate remedy at law and the people of Alabama will suffer irreparable injury unless the court grants the relief prayed for below.

PRAYER FOR RELIEF AND CONCLUSION

18. Unless restrained by this Court, defendants will persist in their damaging activities causing environmental degradation in Mobile Bay to the irreparable injury of the people of Alabama, for which there is no adequate remedy at law.

WHEREFORE, plaintiff prays

(a) That this Court as soon as practicable hold a hearing, at which all parties may present oral and documentary evidence, with regard to the issuance of preliminary injunction, enjoining and restraining defendants, pending final disposition of this suit, from continuing with shell dredging operations in Mobile Bay.

(b) That, after such hearing, this Court issue its preliminary injunction, as aforesaid;

(c) That, upon final hearing, this Court issue its preliminary injunction, enjoining and restraining defendants from continuing shell dredging operations in Mobile Bay without the issuance of a valid permit preceded by the filing of an adequate environmental impact statement and public hearings.

(d) That this Court enter its judgment adjudging and declaring that defendant's actions described hereinabove are in violations of the statutes and other law pleaded.

(e) That plaintiff recover judgment of and from the defendants for their costs; and

(f) For such other and further relief as may be just.

Respectfully submitted,

WILLIAM J. BAXLEY
ATTORNEY GENERAL

WILLIAM FUTRELL
SPECIAL ASSISTANT ATTORNEY GENERAL

HENRY H. CADDELL
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Complaint by placing said copies of same in the U. S. Mail, postage prepaid, and addressed to the following on this _____day of June, 1972:

Corps of Engineers of the United States Army
The Pentagon
Washington D. C

Hon. Stanley R. Resor
Secretary of the Army
The Pentagon
Washington D. C.

General Frederick B. Clarke
Corps of Engineers of the U. S. Army
Chief of Engineers
The Pentagon
Washington D. C.

Dolonel H. A. Griffith
Corps of Engineers of the U. S. Army
District Engineer
Mobile District
Mobile, Alabama

Radcliff Materials Corporation, Inc.
Mobile, Alabama

HENRY H. CADDELL
ASSISTANT ATTORNEY GENERAL

STATE OF ALABAMA)
)
BALDWIN COUNTY)

IN THE CIRCUIT COURT
IN EQUITY
CASE NO.__________

STATE OF ALABAMA, ex rel
William J. Baxley,
Attorney General

COMPLAINANT

VS.

RADCLIFF MATERIALS CORPORATION,
a corporation

RESPONDENT

TO THE HONORABLE TELFAIR J. MASHBURN, SITTING IN EQUITY:

Comes now the State of Alabama on the relation of William J. Baxley, Attorney General and represents and shows unto Your Honor as follows:

1. That as Attorney General, William J. Baxley is privileged to initiate this action in the name of the State of Alabama, according to the provisions of the Code of Alabama (1940), Title 7, Sections 1081 and 1084 and under the provision of Act No. 1260, Regular Session 1971, Sections 3 (1) and 4 (s);

2. That the Respondent has been and is doing business in Baldwin County, Alabama;

3. That Radcliff Materials Corporation is a corporation presently engaged in shellfish dredging operation in Mobile Bay, that extends at times into both Baldwin and Mobile Counties, Alabama;

4. That said corporation is conducting its dredging operations under a lease from the Alabama Department of Conservation enabling it to

take and remove oyster shell, clam shells and shell deposits from the following described property in the State of Alabama, to wit:

> All State-owned bottoms south of Twelve Mile Island (which includes without limitation all of Mobile Bay and its tributaries).

Under the terms of Respondent's lease agreement with the State of Alabama, Respondent shall have no right to carry on dredging or other operations for the removal of shells in any area in which such operations would in the opinion of the State, be harmful to any live oyster reefs that may exist in proximity to the area in which such operations are being carried on;

5. Complainant further alleges that Respondent in conducting its dredging operations is causing the waters of Mobile Bay to become polluted as defined and prohibited by Sections 1 and 2 of Act 1260 Regular Session 1971 and is further in violation of the Water Quality Standards duly promulgated and adopted by the Alabama Water Improvement Commission June 1967, amended July 17, 1972;

6. More particularly, Complainant further alleges unto Your Honor that the people of the State of Alabama have a vested interest in the maintenance of the purity of the waters of this State; that according to Act No. 1260 of the Regular Session 1971, the pollution of the waters of this State constitutes a menance to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial and recreational uses of water; that according to said Act the public policy of this State is to protect, maintain and improve the public water supplies for the propagation of wildlife, fish and aquatic life, and for domestic, agricultural, industrial and recreational uses, and to provide for the prevention, abatement, and control of new or existing water pollution; that according to said Act

"pollution" means such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the State, including, but not limited to, any violation of water quality standards, discharge of industrial wastes or other wastes, or any liquid, gaseous, solid or other substance into any waters of the State as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to fish or other aquatic life;

7. Complainant further alleges that the Alabama Water Improvement Commission, pursuant to Act No. 1260 of the Regular Session 1971, is empowered to issue permits for discharge into any of the waters of the State and has established the following standards, conditions, and criteria included in the "Water Quality Standards for Alabama", June 1967, amended July 17, 1972:

a) The conditions applicable to all water quality criteria provide that the quality of any waters receiving wastes "shall be such as will not cause the best usage of any other waters to be adversely affected . . .";

b) A minimum condition applicable to all state waters is that state waters shall be free from floating materials attributable to wastes in amounts sufficient to be unsightly or interfere directly or indirectly with any classified water use;

c) The turbidity requirement provides "there shall be no turbidity of other than natural origin that will cause substantial visible contrast with the natural appearance of waters or interfere with any beneficial uses which they serve. Furthermore, in no case shall turbidity exceed 50 Jackson units above background. Background will be interpreted as the natural condition of the receiving waters without the influence of manmade or man induced causes. Turbidity levels caused by natural runoff will be included in establishing background levels;"

d) The dissolved oxygen requirements provide:

> "In coastal waters surface dissolved oxygen concentrations shall not be less than 5 mg./l. except where natural phenomena cause the value to be depressed. In esturaries and tidal tributaries dissolved oxygen concentration shall not be less than 5 mg./l. except in dystropic waters or where natural conditions cause the value to be depressed;"

e) The toxicity, color producing, odor producing requirement provides: as to the use of water for swimming and other whole body water-contact sports that:

> "Only such amounts, whether alone or in combination with other substances or wastes, as will not: render the water unsafe or unsuitable for swimming and water-contact sports: be injurious to fish, wildlife and aquatic life or where applicable, shrimp and crabs; impair the palatability of fish, or, where applicable, shrimp and crabs; impair the waters for any other usage established for this classification or unreasonably affect the aesthetic value of waters for any use under this classification;"

as to the propagation and harvesting of shellfish for sale or use as a food product, that:

> "Only such amounts of toxic substances, whether alone or in combination with other substances, as will not: be injurious to fish and aquatic life, including shrimp and crabs; affect the marketability of fish and shellfish, including shrimp and crabs; exceed one-tenth of the 96-hour median tolerance limit for fish, aquatic life or shellfish, including shrimp and crabs.

> "Only such amounts of color, tast and odor producing substances, whether alone or in combination with other substances, as will not: be injurious to fish and shellfish, including shrimp and crabs; adversely affect marketability or palatability of fish and shellfish, including shrimp and crabs; unreasonably affect the aesthetic value of waters for any use under this classification;"

as to fishing, propagation of fish, aquatic life and wildlife, that:

> "Only such amounts of toxic substances, whether alone or in combination with other substances, as will not: be injurious to fish and awuatic life including shrimp and crabs in estuarine or salt waters or the propagation thereof; not to exceed one-tenth of the 96-hour median tolerance limit for fish and aquatic life including shrimp and crabs in salt and estuarine waters except that other limiting concentrations may be used when factually justified and approved by the Commission.
>
> "Only such amounts of taste, odor and color producing substances, whether alone or in combination with other substances as will not be injurious to fish and aquatic life including shrimp and crabs in estuarine and salt waters or adversely affect the propagation thereof: impair the palatability or marketability of fish and wildlife or shrimp and crabs in estuarine and salt waters; unreasonably affect the aesthetic value of waters for any use under this classification;"

8. Moreover, Complainant alleges that the Attorney General is empowered by said Act No. 1260 of the Regular Session 1971, Sections 3 (i) and 4 (s) to initiate action to enjoin any actual or threatened pollution of the waters of this State in violation of the general provisions of said Act and of the specific water quality standards of the Water Development Commision;

9. Moreover, Complainant alleges that in operation of shellfish dredging in Mobile Bay areas of Baldwin County and in Mobile County, the Respondent, Radcliff Materials Corporation, has and continues to pump up a matrix of mud, silt, and shell from the bottom of said Mobile Bay; that all mud and silt is discharged back into the Bay;

and that the water in and about the dredging operation, because of the discharging and resuspension of mud and silt into said Bay, contains a level of turbidity which is irreparably injurious and detrimental to other beneficial uses of the Bay and to fish and other aquatic life; in particular, that said turbidity of said Bay water is irreparably injurious and detrimental to the commercial harvesting of live oysters by the citizens of this County and State, in that live oysters harvested in and near said dredging operation, have accumulated mud and silt in their gills from Respondent's resuspended sediment, thereby making said oysters less palatable and marketable for commercial purposes; that said turbidity of said Bay water is irreparably injurious and detrimental to recreational activity of the citizens of this County and State in the Bay waters in that the muddiness and unsightliness of the waters of said Bay now has and will continue to render the waters less usable for swimming and other aquatic sports; that the turbidity of the Bay water is irreparably injurious and detrimental to fish and other aquatic life, and, in short, to the general aquatic ecology of the Bay waters, in that a) bottom flora and fauna are destroyed by the cutting off of life maintaining sunlight by the resuspended mud and silt and are smothered and destroyed by the settling of resuspended mud and silt, and, b) in that, fish, which feed on such flora and fauna, are harmed because of the destruction of their food source; and, finally, that said turbidity of the Bay water is irreparably injurious and detrimental to the aesthetic quality of said Bay, and thereby injurious and detrimental to the enjoyment of said aesthetic quality by the citizens of this County and State in that the waters, because of Respondents resuspension of mud and silt, have taken and continue to take muddy and unsightly appearance and, furthermore, in that the resuspended mud has been and continues to be washed upon and gathered on the shores of the said Bay, creating a muddy and unsightly appearance on shores of said Mobile Bay;

10. Moreover, Complainant alleges that the turbidity caused by Respondent, as described in the above Paragraph 9, has violated and continues to violate the turbidity standards of June, 1967, as amended July 17, 1972, of the Water Improvement Commission, set forth in the above Paragraph 7 (c), in that said turbidity has caused and continues to cause substantial visible contrast with natural appearance of the Mobile Bay water, that it interferes with other beneficial uses of the Mobile Bay water, and that it exceeds 50 Jackson units above the background for Mobile Bay waters;

11. Moreover, it is alleged that in its operation of shellfish dredging in the Mobile Bay areas of Baldwin County and Mobile County, the Respondent has and continues to pump up a matrix of mud, silt and shell containing DDT, mercury and other toxic materials; that said mud, silt and toxic materials are discharged back into the Bay; and that, because of discharge and resuspension of said materials, waters in and about the dredge used by Respondent contain toxic materials in suspension which are irreparably injurious and detrimental to fish and other aquatic life in said waters and to other beneficial uses of said Bay waters; in particular, that the waters are used by the citizens of this County and State for commercial and recreational fishing and harvesting and that the harm to fish and other aquatic life of Mobile Bay waters is, thereby, injurious and detrimental to said citizens who use the waters for commercial and recreational fishing and harvesting;

12. Moreover, it is alleged that the said increase in toxic

material content of the said water of Mobile Bay, caused by Respondent, as described in the above Paragraph 11, has violated and continues to violate the toxicity standards of June, 1967, as amended July 17, 1972 of the Water Improvement Commission, set forth in the above Paragraph 7 (e);

13. Moreover, it is alleged that in its operation of shellfish dredging in the Mobile Bay areas of Baldwin County and Mobile County, Respondent has and continues to pump up and discharge oxygen consuming materials; that said materials consume oxygen in the water and cause the dissolved oxygen concentration level to decrease thereby harming fish and other aquatic life; that the waters are used by the citizens of this County and State for commercial and recreational fishing and harvesting; and therefore that the harming of fish and other aquatic life, resulting from the lowering of the dissolved oxygen content, is injurious and detrimental to the rights of said citizens who use the waters for commercial and recreational fishing;

14. Moreover, it is alleged that the said lowering of the dissolved oxygen content in the said waters of Mobile Bay by Respondent as described in the above Paragraph 13 is in violation of the Dissolved Oxygen water requirement of June, 1967, amended July 17, 1972 of the Water Improvement Commission, as set forth in Paragraph 7 (d), in that the dissolved oxygen concentration is less than 5 mg./l.;

15. Moreover, it is alleged that because of the pumping up and discharge of mud and silt into the waters of Mobile Bay by Respondent, as described in Paragraph 9, said waters of Mobile Bay are caused to be significantly discolored and caused to have an offensive and foul odor, to the injury and detriment of the aesthetic and recreational uses of

said water of Mobile Bay by the citizens of this County and State; in particular that it is detrimental to recreational activities in that the discoloration now has and will continue to render said waters of Mobile Bay less usable for swimming, boating, wading and other aquatic sports, and that it is irreparably injurious and detrimental to the aesthetic quality of Mobile Bay in that said waters have taken and will continue to take an unsightly appearance and foul odor rendering said waters less usable for aesthetic purposes by the citizens of this County and State;

16. More particularly, Complainant alleges that the discoloration and odor producing conditions described in above Paragraph 15 have violated and continue to violate the discoloration and odor standards of June, 1967 as amended July 17, 1972 of the Water Improvement Commission set forth in the above Paragraph 7 (e);

17. Complainant further alleges that the activities of Respondent in conducting its dredging operations constitute a public nuisance per se in that it has and continues to cause grave and irreparable injury to the oyster resources and industry of the Mobile Bay area, to the commercial seafood industry of the Mobile Bay area, to the right of quiet enjoyment of the citizens of Mobile and Baldwin Counties and of the State of Alabama of the recreational and aesthetic values of the Bay and its surrounding environs and that it has and continues to cause an irrevocable upset to the delicate balance of nature thereby threatening grave and irreparable injury to the ecological stability of the Mobile Bay area.

18. More particularly, Complainant further alleges that Respondent in its dredging operations has caused and continues to cause

irreparable injury to the oyster resources and industry in the Mobile Bay area by its destruction of large quantities of live oysters by conducting its dredging operations upon and through live oyster reefs in violation of Respondent's lease agreement with the State of Alabama, with such dredging operations being conducted with Respondent's full knowledge that such reefs were composed of live oysters; that Respondent in its dredging operations have caused and are continuing to cause irreparable injury to the oyster resources and industry of the Mobile Bay area by its destruction of live oyster beds surrounding the area in which Respondent is conducting its dredging operations in that great quantities of mud, silt and sediment disgorged and resuspended by Respondents in their dredging operations, settle upon and smother such surrounding oyster beds and therefore; all considered, Complainant alleges that the dredging operations being conducted by Respondent in Mobile Bay constitutes a public nuisance in that it is causing and threatening to cause a grave and continuous irreparable injury to the economically important oyster industry and resources of the Mobile Bay area which will continue unless abated;

19. Complainant further alleges that Respondent's dredging operations have caused and continues to cause irreparable injury to the commercial seafood harvesting industry of the Mobile Bay area, that since the commencement of Respondent's dredging operations, due to the extensive turbidity of the waters of the Bay resulting from the disgorging of large amounts of mud, sediment, and silt and resultant degradation in quality of the Bay as habitat for the fish, crab, and shrimp and oyster that constitute the bulk of the seafood industry, the quality and quantity of the seafood harvested has steadily de-

clined; that great financial loss has been suffered by those who earn their livelihood harvesting seafood in Mobile Bay by the loss and damage to nets, line, tackle and other fishing gear and equipment caused by the same falling into the large excavations and becoming fouled on the large mounds of spoil material left by Respondent's dredging operations in and on the floor of Mobile Bay; that much of the area utilized by those who earn their livelihood harvesting seafood in Mobile Bay have been rendered unsafe and hazardous so that at the present time such areas are either avoided altogether by commercial seafood harvestors or ventured into only at great risk to both vessels and crew in that mounds of spoil material left lying unmarked under the surface of the water by Respondent's dredging operations, and barges utilized by Respondents for transporting oyster shells dredged from the floor of the Bay by Respondents to shore which are left unlighted at night present such serious hazards to navigation and therefore, in view of the considerations set forth above, the dredging operations being conducted by Respondent in Mobile Bay constitute a public nuisance in that it is causing grave and continuous irreparable injury to the important, famed and time honored seafood industry of the State of Alabama located in the Mobile Bay area;

20. Complainant further alleges that irreparable injury has been and is being caused to the aesthetic and recreational value of the Mobile Bay area by the large amount of mud, silt and sediment resuspended in the waters of Mobile Bay by Respondent's dredging operations, that the resuspended material creates a foul smelling slime that along with the mud, silt sediment and other materials disgorged by Respondents in their

operations covers the beaches and pollutes the waters for extensive areas surrounding the dredging operations causing such areas which heretofore had been utilized for swimming, boating, wading and other customary forms of aquatic and related recreation to be now completely unfit for such purposes; that the resuspended mud, slim and sediment washed ashore have completely destroyed many of the natural grass beds which formerly added greatly to the natural beauty of the area and provided habitats necessary for game fish; that Respondent's operation of the dredge creates a loud and offensive noise level that greatly interferes with the public's quiet enjoyment of the Bay and its surrounding environs; and therefore, all considered Respondent's dredging operation constitutes a public nuisance and has resulted and will continue to result in irreparable injury to the citizens of Mobile and Baldwin Counties and of the State of Alabama in their right to peaceful enjoyment of Mobile Bay and its surrounding land areas for recreation if such dredging operations are allowed to continue unabated.

21. Complainant further alleges that the increased turbidity of the waters of Mobile Bay resulting from Respondent's dredging operations has caused and is causing an irrevocable upset to the delicate balance of nature and irreparably damaging the ecology of the Mobile Bay, that the increased turbidity has the effect of significantly lowering the dissolved oxygen levels of the Bay's waters which are necessary to sustain marine plant and animal life by resuspending oxygen consuming materials in the water and of resuspending industrial pollutants such as mercury and other toxic materials such as pesticides which have previously adhered to sediment particles and settled to the floor of the

Bay, and furthermore said increased turbidity has the effect of causing the destruction of the eggs of those species of fish which lay eggs that settle to the floor of the Bay; and therefore, all considered, the activities of Respondent in conducting its dredging operations constitutes a public nuisance in that grave and irreparable harm is being and will continue to be caused to the ecological stability of the Bay area unless abated;

22. Complainant further alleges that Respondent's dredging operations, by its discharge and resuspension of vast quantities of mud, silt, sediment and other organic and inorganic materials into the waters of Mobile Bay, constitute pollution of the waters of the Bay under Section 2 of Act No. 1260 Regular Session 1971, in that the discharge renders the waters harmful detrimental or injurious to commercial uses as outlined above in Paragraphs 18 and 19, to recreational uses as outlined in Paragraph 20 and to fish and other aquatic life as outlined in Paragraph 21, and therefore constitutes a public nuisance under Section 4 (j) (7) of said Act.

WHEREFORE, THE PREMISES CONSIDERED, the Complainant prays that this Honorable Court accept jurisdiction of this case and, upon consideration of the premises, this Honorable Court will enter its writ enjoining the Respondent from the further operation of its dredging operations in Baldwin and Mobile Counties as stated in the premises pending final determination of the issues contained herein; that this Honorable Court will cause its rule nisi to go forth to the Respondent ordering it to appear before this Honorable Court and show cause why its dredging operations in Baldwin and Mobile Counties, as stated in the premises should not be enjoined, permanently and forever prohibited; and that Your Honor grant such other, further and different relief as Your Honor may in the premises determine to be just and proper and your Complainant will ever pray . . . .

STATE OF ALABAMA

ex rel

WILLIAM J. BAXLEY
ATTORNEY GENERAL

GEORGE L. BECK
DEPUTY ATTORNEY GENERAL

HENRY H. CADDELL
ASSISTANT ATTORNEY GENERAL

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

Before me, Martha Ingram in and for said county and state at large, personally appeared Henry H. Caddell, who is known to me and who being first duly sworn deposeth and sayeth that he is informed and believes and upon such information and belief verily states that the facts contained in the foregoing bill in equity are true.

Henry H. Caddell
HENRY H. CADDELL

Before me this 19 day of July, 1972.

Martha Ingram
MARTHA INGRAM
NOTARY PUBLIC

THE STATE OF ALABAMA]
COUNTY OF TUSCALOOSA]

IN THE
CIRCUIT COURT OF TUSCALOOSA
COUNTY, ALABAMA
IN EQUITY

CITY OF TUSCALOOSA,
A Municipal Corporation,
COMPLAINANT,

VS.

RICHARD B. DUNCAN,
RESPONDENT.

TO THE HONORABLE, THE CIRCUIT COURT OF TUSCALOOSA COUNTY, ALABAMA, AND TO THE HONORABLE CHARLES W. WARREN AND TO THE HONORABLE REUBEN H. WRIGHT, JUDGES OF SAID COURT, SITTING IN EQUITY:

COMES City of Tuscaloosa, a municipal corporation, Complainant herein, and shows unto your Honors the following facts as a basis for the relief hereinafter prayed, to-wit:

1. That Complainant is a municipal corporation in Tuscaloosa County, Alabama, and that the Respondent, Richard B. Duncan is over twenty-one years of age and resides in Tuscaloosa County, Alabama.

2. That Respondent is engaged in the business of buying young chickens by the thousands when very young and raising them, for sale, on a lot in the City of Tuscaloosa

fronting about eighty-one (81) feet on the west side of Thirty-Second Avenue, and located about two hundred thirty (230) feet from the north margin of Fifth Street, being more particularly described as follows:

> Beginning at a point on the west side of Thirty-Second (32nd) Avenue, to-wit, two hundred thirty (230) feet measured along the west margin of Thirty-Second (32nd) Avenue northwardly from the intersection of the west margin of said Thirty-Second Avenue and the north margin of Fifth (5th) Street; thence westwardly parallel to the north margin of Fifth (5th) Street a distance of to-wit, one hundred seventy-two (172) feet; thence northwardly parallel to the west margin of Thirty-Second (32nd) Avenue a distance of to-wit, eighty-one (81) feet; thence eastwardly parallel to the north margin of Fifth (5th) Street a distance of to-wit, one hundred seventy-two (172) feet to the west margin of Thirty-Second (32nd) Avenue; thence southwardly along the west margin of Thirty-Second (32nd) Avenue a distance of to-wit, eighty-one (81) feet to the point of beginning.

For convenience the above described lot is sometimes hereinafter referred to as "said lot" or "respondent's lot".

3. In the conduct of said business, the Respondent buys chickens when very young and houses, feeds, and raises them in two buildings, sometimes hereinafter referred to as "brooders", constructed by him on said lot about January of the present year. When said chickens become eight or ten weeks old or older Respondent sells or otherwise disposes of them. When he disposes of one quantity of chickens he promptly obtains an additional number of small chickens and repeats the process. Each of said brooders is about one hundred forty-five (145) feet long and

thirty-two (32) feet wide and has a capacity of to-wit, five thousand chickens and for weeks at a time Respondent will have from eight to ten thousand chickens in said two brooders. The brooders have a dirt floor covered with wood shavings and are boarded up from the ground about four feet, and above that they are enclosed with chicken wire or other kind of wire to the roof, so that odors arising therefrom and from the chickens are open to the surrounding air and carried to the public and to private premises of other persons.

4. Except for the chicken business which Respondent has been operating on his said lot since about the early part of January of this year, the block in which Respondent's said lot is located is exclusively residential and has been so for a long number of years and the area of the City in which Respondent's said lot is located and for many blocks therefrom is almost exclusively residential in use. According to the Federal Census of 1950, the City of Tuscaloosa has a population of over 46,000 inhabitants. This section of the City is thickly settled. There are many residences in the block in which said lot is located and in the blocks east, south and west of said block and a large number of people are regularly domiciled and resident thereing. The residents of this area take great pride in their homes and in desirable places to live free from noisome, unpleasant and foul odors and nuisances of all kinds.

5. Complainant further alleges that the Respondent in his conduct of said business, constantly maintains large numbers of chickens in said brooders, frequently as many as eight or ten thousand at a time; that there arises or is given off from said brooders and from said chickens confined therein and from deodorants and other disinfectants and other chemicals used in said brooders, foul, offensive, malodorious, disagreeable and unhealthy odors, fumes and vapors which are spread or blown to premises and residences of others in the block in which said lot is located and in the nearby area to such extent and degree as to materially interfere with the comfort, health, wellbeing, convenience and human existence of theoccupants of said residents in said block and adjacent area; that flies which breed in said brooders are on the said lot or are attracted thereto by the presence of the said chickens and odors from said brooders infest the premises of the residences in said block in such numbers and of such character as to be a source of great annoyance, inconvenience, and discomfort to said residents and to the residents in the surrounding area and to be a source of danger to the health of said residents and to the public.

6. Complainant further alleges that to-w't, in the early part of December, 1950, the Respondent made application for a building permit to construct said two buildings on said lot to be used for keeping, feeding and housing and raising chickens for the market. When it became known

to the residents in the vicinity of said lot that such an application for building permit for such purpose had been made to the City, they appeared in large numbers before the Commission Board and protested and objected to such building permit being issued on the ground that the conduct of such business as proposed by the Respondent would constitute a nuisance, they or some of them having been informed that the governing authority of the City could decline to issue such a permit if in the opinion of the Commission Board the use of such buildings would constitute a nuisance. The Respondent appeared before the Commission Board and assured the Board that the business could and would be so conducted as not to be objectionable to the residents in the vicinity and would not be a nuisance. The Commission Board being of the opinion that it should not prejudge the question without giving the Respondent an opportunity to find out whether or not he could conduct such business without its being a nuisance or without its being offensive to the occupants of nearby residences, authorized the permit to be issued, at the same time telling the Respondent that if he constructed the buildings it would be at his own risk and that if the conduct of the business proved in fact to be a nuisance the City would take legal action to abate it. Further notice was given to Respondent to like effect in a letter to him from Mr. James S. Robertson, Chairman of the Commission Board, a true copy of which is hereto attached, marked Exhibit "A" and made a part hereof to the same extent as if herein fully set out. Notwithstanding said admonition, the Respondent constructed said buildings and began the conduct of said business in about the month of January, 1951, and has continued to operate it continuously since that time.

7. Complainant further alleges that the City has in force and effect a valid ordinance duly adopted and ordained by the Commission Board of Tuscaloosa on to-wit, June 12, 1951, namely, Ordinance Number 1145, entitled, "An Ordinance Prohibiting Public Nuisances and Other Purposes", a copy of which ordinance is hereto attached, marked Exhibit "B" and made a part hereof to the same extent as if herein set out in full.

And complainant further alleges that the Respondent is maintaining a public nuisance on said lot as defined and set forth in said ordinance in that he raises, maintains, has in possession, and feeds, chickens in very large numbers, to-wit, from eight to ten thousand, on said lot adjacent to or in proximity to residential premises of a large number of people in such numbers, or in such manner or under such conditions or circumstances or with such result as to be offensive, or unwholesome or a source of annoyance, or as to be a source of injury, or a detriment to the health, comfort or welfare of such other persons and their families occupying such adjacent premises or premises in proximity thereto and to that part of the community living in the surrounding area and under such conditions and circumstances or with such result that foul, offensive odors emanate therefrom and spread or are blown to adjacent premises and to the public street to the annoyance and discomfort of such other people and their families. The Complainant alleges that the conduct of said business in the manner aforesaid, is, or is likely to be, prejudicial to the health and comfort and offensive to the senses of ordinary citizens living in the community where said lot is located.

WHEREFORE, THE PREMISES CONSIDERED, the Complainant prays for the following relief, to-wit:

(A) That Richard B. Duncan be made party Respondent to the Bill of Complaint herein and that appropriate summons and citation issued out of this Court directed to said Respondent in manner and form required by law, directing and commanding such Respondent to be and appear in this Court and plead, answer or demur to the Bill of Complaint herein within the time allowed and provided by law.

(B) That upon the final hearing of the pleading and proof in this cause an order be entered commanding and enjoining Respondent to cease and desist from further doing the acts and conduct hereinabove complained of.

(C) That upon the final hearing of the pleading and proof herein appropriate injunction be granted herein commanding Respondent not to thereafter emit or cause to be emitted or produced any such foul, offensive, unwholesome or noisome odors, fumes or vapors into the public ways and residences or private premises of others in the City of Tuscaloosa, Alabama.

(D) That upon the final hearing of the pleading and proof herein that the Court decree that the operation by the Respondent of said business of feeding, raising and housing, chickens on his said lot as hereinabove described, constitutes a public nuisance and that appropriate orders and decrees of this Court be entered commanding an abatement thereof.

(E) Complainant prays for all such other, further or different relief to which in equity and good conscience Complainant may be entitled under the pleading and proof herein.

____
Solicitor for Complainant

THE STATE OF ALABAMA I
COUNTY OF TUSCALOOSA I

Before me, ____, a Notary Public in and for aforesaid County and State personally appeared S. H. Sprott, who being by me first duly sworn, deposes and says that he is City Attorney for the City of Tuscaloosa, Alabama, and that as such he has investigated the facts set out in the foregoing Bill of Complaint, and is conversant with the facts alleged therein, and that said facts therein set out are true to the best of his knowledge, information and belief.

____

Sworn to and subscribed before me this ________ day of ______________________, 1951.

____
Notary Public in and for said
Tuscaloosa County, Alabama.